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*Creating Opportunities: A Vision for the Future*

# Tension and Reconciliation in Canadian Contract Law Casebooks

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## **Abstract**

Canadian common law contract law casebooks are beset with a tension. On the one hand, they all reveal a sustained commitment to the “wholesale assault on the jurisprudence of forms, concepts, and rules” that typifies American Legal Realism and its intellectual descendants. Concern with underlying values, functional reasoning, social realities, and policy thinking pervades the explicit messages of Canadian contract law casebooks and their editors’ related writings. On the other hand, the two casebooks most frequently assigned embody an allegiance to rules and courts that has a close kinship with the classical attitudes purportedly rejected. They convey a monolithic image of legal reasoning that emphasizes rules, certainty, and analogical reasoning and that marginalizes policy thinking. The range of skills, and image of lawyer, communicated by the books is much narrower than their critical and realist introductions imply. Accordingly, the casebooks suggest that Canadian legal thought may be typified by theoretical eclecticism coexisting with methodological homogeneity. This characterization provokes three alternative responses. First, casebook editors may embrace this vision and mount a principled defence of it. Second, they may reject it and aim to operationalize their realist and critical commitments into a more methodologically plural casebook, as has been done in the United States. Third, a re-imagined set of teaching materials organized not around cases but around “empirically recurring problems of contracting parties” may transcend the paradigm. This last avenue holds the most promise for embodying a capacious vision of legal education.

## **Cover Page Footnote**

I would like to acknowledge the financial support of the Social Sciences and Humanities Research Council of Canada, via the Vanier Canada Graduate Scholarship, and the Faculty of Law, University of Toronto. Canadian legal publishers—Thomson Reuters Canada, Emond, and LexisNexis Canada—have generously provided free review copies of casebooks and other materials. They have also shared confidential sales data, for which I am exceedingly grateful. I am grateful to the National Committee of Accreditation of the Federation of Law Societies of Canada for providing details about their Contract Law examinations sittings. For helpful comments and encouragement, I am indebted to Angela Fernandez, Jennifer Nedelsky, David Schneiderman, Blaine Baker, Joel Bakan, Thomas McMorrow, Joshua Karton, John Enman-Beech, Anton Piatigorsky, Sarah Polley, and the anonymous reviewer. This article incorporates empirical research conducted under a Research Ethics Board approval at the University of Toronto.

# Tension and Reconciliation in Canadian Contract Law Casebooks

DAVID SANDOMIERSKI\*

Canadian common law contract law casebooks are beset with a tension. On the one hand, they all reveal a sustained commitment to the “wholesale assault on the jurisprudence of forms, concepts, and rules” that typifies American Legal Realism and its intellectual descendants. Concern with underlying values, functional reasoning, social realities, and policy thinking pervades the explicit messages of Canadian contract law casebooks and their editors’ related writings. On the other hand, the two casebooks most frequently assigned embody an allegiance to rules and courts that has a close kinship with the classical attitudes purportedly rejected. They convey a monolithic image of legal reasoning that emphasizes rules, certainty, and analogical reasoning and that marginalizes policy thinking. The range of skills, and image of lawyer, communicated by the books is much narrower than their critical and realist introductions imply. Accordingly, the casebooks suggest that Canadian legal thought may be typified by theoretical eclecticism coexisting with methodological homogeneity. This characterization provokes three alternative responses. First, casebook editors may embrace this vision and mount a principled defence of it. Second, they may reject it and aim to operationalize their realist and critical commitments into a more methodologically plural casebook, as has been done in the United States. Third, a re-imagined set of teaching

\* SJD candidate, Faculty of Law, University of Toronto. I would like to acknowledge the financial support of the Social Sciences and Humanities Research Council of Canada, via the Vanier Canada Graduate Scholarship, and the Faculty of Law, University of Toronto. Canadian legal publishers—Thomson Reuters Canada, Emond, and LexisNexis Canada—have generously provided free review copies of casebooks and other materials. They have also shared confidential sales data, for which I am exceedingly grateful. I am grateful to the National Committee of Accreditation of the Federation of Law Societies of Canada for providing details about their Contract Law examinations sittings. For helpful comments and encouragement, I am indebted to Angela Fernandez, Jennifer Nedelsky, David Schneiderman, Blaine Baker, Joel Bakan, Thomas McMorrow, Joshua Karton, John Enman-Beech, Anton Piatigorsky, Sarah Polley, and the anonymous reviewer. This article incorporates empirical research conducted under a Research Ethics Board approval at the University of Toronto.

materials organized not around cases but around “empirically recurring problems of contracting parties” may transcend the paradigm. This last avenue holds the most promise for embodying a capacious vision of legal education.

Les recueils de décisions en droit contractuel en common law du Canada sont traversés par une tension particulière. D’une part, ils traduisent tous la volonté systématique de « combattre massivement la jurisprudence des formes, des concepts et des règles » dans la droite lignée du réalisme juridique américain et de ses héritiers intellectuels. Les inquiétudes relatives aux valeurs sous-jacentes, au raisonnement fonctionnel, aux réalités sociales et à la réflexion stratégique transparaissent dans les messages explicitement véhiculés dans les recueils canadiens de décisions en droit contractuel et les écrits connexes de leurs rédacteurs. D’autre part, les deux recueils les plus fréquemment étudiés témoignent d’un profond respect envers les règles et les tribunaux et d’un lien étroit avec les attitudes classiques soi-disant rejetées. Ils présentent une image monolithique du raisonnement juridique en mettant l’accent sur les règles, la certitude et le raisonnement analogique tout en marginalisant la réflexion stratégique. Les compétences et l’image des avocats, telles qu’elles sont transmises par ces recueils, sont bien plus restreintes que celles induites par leurs introductions critiques et réalistes. En conséquence, les recueils donnent à penser que la pensée juridique canadienne se caractérise par un éclectisme théorique qui cohabite avec une homogénéité méthodologique. Une telle caractérisation entraîne trois réactions différentes. Premièrement, les rédacteurs de recueils peuvent partager cette vision et la défendre de manière raisonnée. Deuxièmement, ils peuvent la rejeter et chercher à mettre en application leurs engagements réalistes et critiques dans un recueil de décisions mobilisant des méthodologies plurielles, comme c’est le cas aux États-Unis. Troisièmement, ils peuvent transcender ce paradigme en élaborant un ensemble réinventé de supports pédagogiques, qui ne s’articulerait pas autour de décisions judiciaires, mais plutôt autour de « problèmes empiriques rencontrés fréquemment par des parties contractantes ». Cette dernière option offre les meilleures chances d’établir une vision globale de l’éducation juridique.

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INTRODUCTION .....	1183
A. Methodology .....	1189
I. CRITICAL AND REALIST PERSPECTIVES IN CANADIAN CONTRACT LAW CASEBOOKS .....	1191
A. <i>Swan</i> .....	1192
1. The <i>Swan</i> vision .....	1193
i. The Reasonable Expectations of the Parties .....	1193
ii. Functional Reasoning, Policy, and Conflicting Values .....	1194
iii. The Solicitor’s Perspective .....	1195
iv. Fairness and Decency .....	1197
2. The <i>Swan</i> Remedies Chapter: A Consistent Set of Realist Messages .....	1198
B. <i>Waddams and Milner</i> .....	1200
1. <i>Milner</i> .....	1200
2. <i>Waddams</i> .....	1203
i. A Present-Day Corbin: Messages from <i>Waddams</i> ’S Textbook .....	1204
ii. Realism and Functionalism In the Remedies Chapter of <i>Waddams</i> .....	1205
iii. Summary: American Legal Thought in <i>Waddams</i> .....	1207
C. <i>Boyle/Ben-Ishai and Percy</i> .....	1207
1. The Boyle Introduction .....	1208
i. American Legal Realism ... ..	1208
ii. ... And Its “Heirs” .....	1209
2. Ben-Ishai and Percy’s Influence .....	1211
3. Ben-Ishai’s Remedies Chapter .....	1213
D. Summary of Part I: “All Realist Now” .....	1215

II.	THE TRADITIONAL FLIP SIDE: RULES, COURTS, AND LEGAL REASONING .....	1215
A.	Messages Conveyed by the Casebooks.....	1216
1.	Analogical Reasoning.....	1216
2.	The Importance of Rules .....	1216
3.	The Marginalization of Policy .....	1217
4.	The Centrality of Adjudication .....	1218
5.	The "Traditional," Unproblematized "Core" of Legal Study.....	1219
B.	Messages Received by Readers.....	1220
1.	Messages Received from <i>Boyle and Percy</i> .....	1220
2.	Messages Received from Waddams.....	1222
i.	<i>Introduction to the Study of Law: Roderick Macdonald's Critique</i> .....	1223
III.	CHARACTERIZING THE CONTRADICTION .....	1225
A.	External Pressures.....	1226
1.	The Familiar Trope: Theory vs Practice, Academy vs Profession.....	1226
2.	The Capability (and Unavailability) Problems .....	1227
B.	Ambivalence .....	1228
C.	Reconciliation .....	1230
1.	A Unified Conception: Realist Ideas <i>Serve</i> the Rule of Law .....	1230
2.	Methodological Homogeneity and Theoretical Eclecticism .....	1233
3.	Pedagogical Effectiveness.....	1235
	CONCLUSION: BACK TO THE FUTURE.....	1240
A.	Incorporating Theoretical Eclecticism into Legal Methodology .....	1240
B.	An Explicit Defence.....	1240
C.	A Third Way: A New Framework for Studying Contract Law .....	1241

## INTRODUCTION

Contract law casebooks are a rich source of information about the messages communicated to students about what it means to think, work, and identify as lawyers.<sup>1</sup> First year law school is a key moment in law students' intellectual and professional formation, the year when they are purportedly transformed into people who can "think like lawyers."<sup>2</sup> Contract Law is a universal course in first year legal education<sup>3</sup> and figures prominently in the popular culture about

1. See Janet Ainsworth, "Law in (Case)books, Law (School) in Action: The Case for Casebook Reviews" (1997) 20:2 Seattle UL Rev 271 at 275.
2. See e.g. Elizabeth Mertz, *The Language of Law School: Learning to Think Like a Lawyer* (New York: Oxford University Press, 2007).
3. All Canadian common law faculties teach Contract Law or some variation thereof, in first year (e.g., Contracts and Judicial Decision-making at Dalhousie). The vast majority of US schools do so as well, with one notable exception being the functionally organized course in Bargain, Exchange, and Liability in Georgetown Law School's Curriculum B. See Georgetown Law, "Curriculum Guide," online: <apps.law.georgetown.edu/curriculum/tab\_clusters.cfm?Status=Cluster&Detail=105>. Historically, this was also the case throughout North America. See Alfred Zantinger Reed, "Present-Day Law Schools in the United States and Canada" in Carnegie Foundation Bulletin No 21 (Boston: Merrymount Press, 1928) at 256.

legal education.<sup>4</sup> Perhaps most of all, contract law is a flashpoint for competing views of law—most of the major twentieth-century schools of legal thought has a prominent example in contracts scholarship.<sup>5</sup> For all of these reasons, careful scrutiny of casebooks is warranted for understanding the “particular jurisprudential and normative belief systems”<sup>6</sup> that the books may transmit.

In the United States, scholars have embraced the contract law casebook as metonym for the shifting and turbulent terrain of legal thought. The first contracts casebook, by Christopher Columbus Langdell,<sup>7</sup> is not only the origin of the ubiquitous case method, it also serves as one of the best concrete examples of “classical legal thought”—the nineteenth-century “consensus”<sup>8</sup> view of law as unified, coherent, formal, and rational.<sup>9</sup> Once the “age of anthology,” which

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4. See e.g. Scott Turow, *One L: The Turbulent True Story of a First Year at Harvard Law School* (New York: Farrar, Straus & Giroux, 1977); *The Paper Chase*, 1973 DVD (Beverly Hills, Cal: 20th Century Fox Home Entertainment, 2003).
  5. For formalism, see e.g. Samuel Williston, ed, *A Selection of Cases on the Law of Contracts*, vol 1 (Boston: Little, Brown, and Company, 1903). For realism, see e.g. Arthur Linton Corbin, *Corbin on Contracts: A Comprehensive Treatise on the Rules of Contract Law* (St. Paul, Minn: West, 1950). For realism and functionalism, see e.g. LL Fuller & William R Perdue Jr, “The Reliance Interest in Contract Damages: 1” (1936) 46:1 Yale LJ 52 [Fuller & Perdue, “Reliance Interest 1”]; LL Fuller & William R Perdue Jr, “The Reliance Interest in Contract Damages: 2” (1937) 46:3 Yale LJ 373 [Fuller & Perdue, “Reliance Interest 2”]. For Critical Legal Studies, see e.g. Jay M Feinman, “Critical Approaches to Contract Law” (1983) 30:4 UCLA L Rev 829. For law and economics, see e.g. Anthony T Kronman & Richard A Posner, *The Economics of Contract Law* (Boston: Little, Brown & Co, 1979). For feminism, see e.g. Clare Dalton, “An Essay in the Deconstruction of Contract Doctrine” (1985) 94:5 Yale LJ 997. For socio-legal studies, see e.g. Stewart Macaulay, “Non-Contractual Relations in Business: A Preliminary Study” (1963) 28:1 Am Soc Rev 55 [Macaulay, “Non-Contractual Relations”]. For relational theory, see e.g. Ian R Macneil, “The Many Futures of Contracts” (1974) 47:3 S Cal L Rev 691.
  6. Ainsworth, *supra* note 1 at 274.
  7. *A Selection of Cases on the Law of Contracts: with a Summary of the Topics Covered by the Cases*, 2nd ed (Boston: Little, Brown, & Co, 1879).
  8. David Kennedy & William W Fisher III, “Introduction” in David Kennedy & William W Fisher III, eds, *The Canon of American Legal Thought* (Princeton: Princeton University Press, 2006) 1 at 8.
  9. See Thomas C Grey, “Langdell’s Orthodoxy” (1983) 45:1 U Pitt L Rev 1 at 11; Duncan Kennedy, “Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought In America, 1850-1940” (1980) 3 Res in L & Soc’y 3 at 8; Duncan Kennedy, “Form and Substance in Private Law Adjudication” (1976) 89:8 Harv L Rev 1685 at 1729 [Kennedy, “Form and Substance”]; Morton Horwitz, “The Rise of Legal Formalism” (1975) 19:4 Am J Legal Hist 251.

Langdell ushered in, ended in the mid-twentieth century,<sup>10</sup> casebooks were increasingly reviewed for the way editors “wear their heart upon their sleeve.”<sup>11</sup> Accordingly, casebooks signaled profound changes in attitude about legal thought. Lon Fuller’s “post-realist”<sup>12</sup> innovation in 1947,<sup>13</sup> Friedrich Kessler and Malcom Sharp’s “anticonceptualist”<sup>14</sup> intervention in 1953,<sup>15</sup> and Charles Knapp’s “humanist”<sup>16</sup> take on the teaching matter in 1976<sup>17</sup> stand as three well-reviewed examples.<sup>18</sup>

In Canada, meta-level discussion about the casebooks is less developed. While there are numerous thoughtful reviews of selected editions of Canadian contract law casebooks,<sup>19</sup> there has been little attempt, if any, to draw high-level insights by looking at the books together and over the course of their development. This article attempts to do precisely that. I look at the prefaces and introductions

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10. See E Allan Farnsworth, “Contracts Scholarship in the Age of the Anthology” (1987) 85:6 Mich L Rev 1406 at 1407.
  11. Benjamin Kaplan, Book Review of *Contracts: Cases and Materials* by Friedrich Kessler & Malcolm Pitman Sharp, (1954) 63:7 Yale LJ 1039 at 1039.
  12. Karl E Klare, “Contracts Jurisprudence and the First-Year Casebook,” Book Review of *Problems in Contract Law: Cases and Materials* by Charles L Knapp, (1979) 54:4 NYU L Rev 876 at 882.
  13. Lon L Fuller, *Basic Contract Law* (St Paul, Minn: West, 1947).
  14. Klare, *supra* note 12 at 884.
  15. Friedrich Kessler & Malcolm Pitman Sharp, *Contracts: Cases and Materials* (New York: Prentice-Hall, 1953).
  16. Klare, *supra* note 12 at 895.
  17. Charles L Knapp, *Problems in Contract Law: Cases and Materials* (Boston: Little, Brown & Co, 1976).
  18. See e.g. Malcolm Sharp, Book Review of *Basic Contract Law* by Lon L Fuller, (1948) 15:3 U Chi L Rev 795; Kaplan, *supra* note 11; Klare, *supra* note 12.
  19. See e.g. Mary Hatherly, Book Review of *Studies in Contract Law* by Barry J Reiter & John Swan, eds, (1981) 30 UNBLJ 265; Linda Vincent, Book Review of *Contracts: Cases, Notes & Materials* by John Swan & Barry J Reiter, eds, (1979) 9 Man LJ 347; Richard F Devlin, Book Review of *Contracts: Cases and Commentaries*, 5th ed, by Christine Boyle & David R Percy, eds, (1996) 27:1 Can Bus LJ 144; David Vaver, Book Review of *Contracts: Cases and Commentaries*, 1st ed, by Christine Boyle & David R Percy, eds, (1979) 17:3 Alta L Rev 567; JA Manwaring, Book Review of *Contracts: Cases and Commentaries*, 2nd ed, by Christine Boyle & David R Percy, eds, (1982) Can Bar Rev 781; Christopher Carr, Book Review of *Milner’s Cases and Materials on Contracts*, 2nd ed, by SM Waddams, ed, (1971) 6:2 UBC L Rev 451; Clifford Ian Kyer, Book Review of *Milner’s Cases and Materials on Contracts*, 3rd ed, by SM Waddams, ed, and *Contracts: Cases, Notes and Materials*, by John Swan & Barry J Reiter, eds, (1978) 37:1 UT Fac L Rev 152.

of four published casebooks—one historical (*Milner*),<sup>20</sup> three current (*Swan*,<sup>21</sup> *Waddams*,<sup>22</sup> and *Boyle/Ben-Ishai and Percy*)<sup>23</sup>—to discern the explicit and implied messages about law, legal thought, legal reasoning, and legal practice. I compare

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20. JB Milner, ed, *Cases and Materials on Contracts* (Toronto: University of Toronto Press, 1963) [*Milner* 1st ed]; SM Waddams, ed, *Milner's Cases and Materials on Contracts*, 2nd ed (Toronto: University of Toronto Press, 1971) [*Milner* 2nd ed]; SM Waddams, ed, *Milner's Cases and Materials on Contracts*, 3rd ed (Toronto: University of Toronto Press, 1977) [*Milner* 3rd ed]; SM Waddams, ed, *Milner's Cases and Materials on Contracts*, 4th ed (Toronto: Emond Montgomery, 1985) [*Milner* 4th ed].
  21. John Swan & Barry J Reiter, eds, *Contracts: Cases, Notes & Materials* (Toronto: Butterworth & Co, 1978) [*Swan* 1st ed]; John Swan & Barry J Reiter, eds, *Contracts: Cases, Notes & Materials*, 2nd ed (Toronto: Butterworth & Co, 1982) [*Swan* 2nd ed]; John Swan & Barry J Reiter, eds, *Contracts: Cases, Notes & Materials*, 3rd ed (Toronto: Emond Montgomery, 1985) [*Swan* 3rd ed]; John Swan & Barry J Reiter, eds, *Contracts: Cases, Notes & Materials*, 4th ed (Toronto: Emond Montgomery, 1991) [*Swan* 4th ed]; John Swan, Barry J Reiter & Nicholas C Bala, eds, *Contracts: Cases, Notes & Materials*, 5th ed (Toronto: Butterworths, 1997) [*Swan* 5th ed]; John Swan, Barry J Reiter & Nicholas C Bala, eds, *Contracts: Cases, Notes & Materials*, 6th ed (Toronto: Butterworths, 2002) [*Swan* 6th ed]; John Swan, Barry J Reiter & Nicholas C Bala, eds, *Contracts: Cases, Notes & Materials*, 7th ed (Toronto: LexisNexis Canada, 2006) [*Swan* 7th ed]; Angela Swan, Barry J Reiter & Nicholas C Bala, eds, *Contracts: Cases, Notes & Materials*, 8th ed (Toronto: LexisNexis Canada, 2010) [*Swan* 8th ed]; Angela Swan, Nicholas C Bala & Jakub Adamski, eds, *Contracts: Cases, Notes & Materials*, 9th ed (Toronto: LexisNexis Canada, 2015) [*Swan* 9th ed].
  22. SM Waddams, M Trebilcock & MA Waldron, eds, *Cases and Materials on Contracts* (Toronto: Emond Montgomery, 1994) [*Waddams* 1st ed]; SM Waddams, M Trebilcock & MA Waldron, eds, *Cases and Materials on Contracts*, 2nd ed (Toronto: Emond Montgomery, 2000) [*Waddams* 2nd ed]; SM Waddams et al, eds, *Cases and Materials on Contracts*, 3rd ed (Toronto: Emond Montgomery, 2005) [*Waddams* 3rd ed]; SM Waddams et al, eds, *Cases and Materials on Contracts*, 4th ed (Toronto: Emond Montgomery, 2010) [*Waddams* 4th ed]; SM Waddams et al, eds, *Cases and Materials on Contracts*, 5th ed (Toronto: Emond Montgomery, 2014) [*Waddams* 5th ed].
  23. Christine Boyle & David R Percy, eds, *Contracts: Cases and Commentaries* (Toronto: Carswell, 1978) [*Boyle & Percy* 1st ed]; Christine Boyle & David R Percy, eds, *Contracts: Cases and Commentaries*, 2nd ed (Toronto: Carswell, 1981) [*Boyle & Percy* 2nd ed]; Christine Boyle & David R Percy, eds, *Contracts: Cases and Commentaries*, 3rd ed (Toronto: Carswell, 1985) [*Boyle & Percy* 3rd ed]; Christine Boyle & David R Percy, eds, *Contracts: Cases and Commentaries*, 4th ed (Toronto: Carswell, 1989) [*Boyle & Percy* 4th ed]; Christine Boyle & David R Percy, eds, *Contracts: Cases and Commentaries*, 5th ed (Toronto: Carswell, 1994); Christine Boyle & David R Percy, eds, *Contracts: Cases and Commentaries*, 6th ed (Toronto: Carswell, 1999) [*Boyle & Percy* 6th ed]; Christine Boyle & David R Percy, eds, *Contracts: Cases and Commentaries*, 7th ed (Toronto: Thomson Carswell, 2004) [*Boyle & Percy* 7th ed]; Stephanie Ben-Ishai & David R Percy, eds, *Contracts: Cases and Commentaries* (Toronto: Carswell, 2009) [*Ben-Ishai & Percy* 8th ed]; Stephanie Ben-Ishai & David R Percy, eds, *Contracts: Cases and Commentaries*, 9th ed (Toronto: Carswell, 2014) [*Ben-Ishai & Percy* 9th ed].



what these editors say with what they do by looking at the remedies chapters of the current books. And, I situate this in a broader context of Canadian legal scholarly discourse by drawing on reviews of the casebooks, and other selected writings by the casebook editors. All of this analysis is informed by empirical research on the teaching of contract law in Canada—a study in which I have spoken with sixty-seven Canadian contract law teachers, including many of the editors themselves, and obtained course materials from them and eight others.

On the basis of this analysis, this article aims to make three distinct contributions. First is to elucidate the intellectual influences on the casebooks. All the major books in Canada owe a large intellectual debt to “canonical” American legal scholars who attacked the formalist consensus of the nineteenth century.<sup>24</sup> Chief among these are the American Legal Realists. Canadian contract law editors articulate commitments to realist ideas that lawyers should seek to understand the “underlying values” of rules and doctrines, that they should reason purposively and functionally, that they should consider social realities of contracting, and that policy thinking is of central importance. The influences of Arthur Corbin, Lon Fuller, Grant Gilmore, and Ian Macneil figure prominently. Ideas from later schools also play a central role—legal process (concerns about institutional competence), law and economics, critical legal studies, socio-legal approaches, and feminist and race critiques of contract doctrine. The influences manifest differently in each of the books—sometimes incorporated into explicit argument (*Swan*), sometimes operating implicitly in editorial choices (*Waddams*), sometimes coalescing in a critical survey (*Boyle/Ben-Ishai and Percy*), sometimes appearing in a “Perspectives” chapter (*Waddams*). However expressed, the intellectual theories that explicitly frame the study of contract law in Canada largely derive from these American, critical traditions. Part I of the article sets out these influences and their manifestations in some detail.

Despite this surface commitment to realist and critical approaches, however, the two most frequently used casebooks, *Boyle/Ben-Ishai and Percy* and *Waddams*,<sup>25</sup> simultaneously pledge or embody an allegiance to rules and courts that has a close kinship with the classical attitudes purportedly rejected. Part II establishes this contradiction. Whether expressed as a commitment to “tradition” or simply presented without commentary, these books treat cases as the archetypal source of law, and legal reasoning as predominantly the exercise of distilling rules and

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24. References to the American “canon” in this article derive from the usage in Kennedy & Fisher, *supra* note 8.

25. As I detail at the outset to Part I, below, *Waddams* and *Boyle/Ben-Ishai and Percy* have, combined, about ninety percent market share in Canada.

applying them to hypothetical fact situations in search of relevant similarities. This focus on rules and cases betrays an underlying commitment to the formalist values of coherence and consistency and tends to marginalize considerations of policy, politics, and social context.

The third Part of this article explores three possible characterizations of this tension between realist/critical commitments, on the one hand, and classical/traditional commitments, on the other. First, the tension may be understood as the result of external pressures, on the theory that editors would otherwise have sought to reduce the cognitive dissonance caused by the contradictions. After suggesting two such pressures—that editors are driven to depart from their “academic” inclinations toward realism by pressures from the “profession,” or the simple unavailability of alternative sources—I argue that on closer analysis the casebooks do not sustain either interpretation.

Alternatively, the tension may reflect “intellectual ambivalence”—the “simultaneous adherence to contradictory propositions.”<sup>26</sup> On this interpretation, the commitments are acknowledged as contradictory, but this is not necessarily a sign of a failure to overcome external obstacles. Sustaining disparate ideas in a state of tension may instead signal a distinctive Canadian legal sensibility—the tendency for toleration, reflective of a legal culture characterized by the encounter of separate traditions. I leave this as a suggestion ripe for future inquiry, and suggest that in the end, a third characterization is most compelling.

The casebooks suggest that mainstream Canadian legal thought reflects a simultaneous commitment to theoretical eclecticism and methodological homogeneity, the refusal to “operationalize” its theoretical commitments into a vision of what it means to think like or practice as a lawyer. This characterization accounts for the tensions observed in *Milner*, *Waddams*, and *Boyle/Ben-Ishai and Percy*, and also for the fact that *Swan*, the one book that tailors its methodology to its theory, is the least adopted book. This observation signals a departure from the American tradition, in which legal reasoning is described as the “methodological sediment” laid down by successive periods of criticism and reform.<sup>27</sup>

I argue that this characterization compels one of three responses. If editors choose to reject it, then they ought to make a more thorough attempt to diversify the range of legal thinking skills and images of what it means to be a lawyer or legally-educated citizen in the books—to translate the theoretical eclecticism into a more methodologically plural casebook, as has been attempted in the United

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26. J LaPlanche & JB Pontalis, *The Language of Psychoanalysis*, translated by Donald Nicholson-Smith (London: Hogarth Press and the Institute of Psychoanalysis, 1973) at 26.

27. Kennedy & Fisher, *supra* note 8 at 3.

States. If, on the other hand, they choose to embrace the characterization, then they ought to articulate and defend why one particular methodology deserves to be emphasized, and explain how this is consistent with a genuine commitment to a range of critical theories. In the end, I suggest that a third option might be best. After almost a century and half, it may be time for a set of contract law teaching materials that focuses not on judicial decisions but on parties' actual contracting behaviour. It may be time, in other words, for the teaching materials to "complete" the digestion of legal realism into the academy and embody the transition from "law in books" to "law in action."<sup>28</sup>

## A. METHODOLOGY

This review of casebooks is situated in a broader empirical study into the teaching of contract law in Canada, one that seeks to investigate the attitudes, goals, and practices of instructors of first-year Contract Law, taught in the common law tradition.<sup>29</sup> The study as a whole is grounded in the "interpretive paradigm" of qualitative research, whose goals "involve empathetic understanding of participants' day-to-day experiences and an increased awareness of the multiple meanings given to the routine and problematic events by those in the setting."<sup>30</sup> I seek to discover what "meanings, symbols, beliefs, ideas, and feelings"<sup>31</sup> professors hold or adopt about law, legal education, and legal practice, and compare these attitudes with teaching practices to determine the fit between aspiration and reality. First-year Contract Law serves as a case study for understanding the broader phenomenon of professional legal education.

I situate my own legal theoretical commitments within the tradition of critical legal pluralism.<sup>32</sup> But while the deeper motivation for this project lies in helping

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28. See Alfred S Konefsky et al, "In Memoriam: The Intellectual Legacy of Lon Fuller" (1981) 30:2 Buff L Rev 263; Roscoe Pound, "Law in Books and Law in Action" (1910) 44:1 Am L Rev 12.

29. Seventy-five instructors from all common law faculties in Canada, plus the McGill Faculty of Law, have participated in my study. Of these, sixty-seven participated in a semi-structured interview and an additional eight have provided me with written course materials (syllabi, exams, reading lists, supplementary materials, etc). The data collection period spanned approximately four years: My first interview was on 26 February 2013 and my final interview was on 1 February 2017.

30. Carol A Bailey, *A Guide to Qualitative Field Research*, 2nd ed (Thousand Oaks, Cal: Pine Forge Press, 2007) at 53.

31. *Ibid.*

32. See Roderick A Macdonald & David Sandomierski, "Against Nomopolies" (2006) 57:4 N Ir Leg Q 610; David Sandomierski, "Legal Inquiry: A Liberal Arts Experiment in Demystifying Law" (2014) 29:3 CJS 311.

to realize legal education's human and social potential, the methodological aims of the study are decidedly interpretive, and not "critical."<sup>33</sup> My main desire is to understand the complex phenomenon of contract law teaching.

Accordingly, throughout the study and in this article, I borrow from the techniques and practices of grounded theory. I aim to develop insight from the data themselves, "coding" for themes and relating these codes at increasingly higher levels of abstraction until a "theory" emerges.<sup>34</sup> In this article, I mostly treat the casebooks as textual empirical data, analyzing the text in light of the themes of realism and formalism, and attempting to draw higher-level insights. To a lesser degree, I triangulate my textual analysis with the insights I have gained from the other sources of data in my study. Thus, I am able to draw parallels between what is written in the casebooks and what some law professors (including some editors) have told me in my interviews; I am able to make claims about the relative market share of each casebook; and I am able, in a modest way, to discuss how instructors actually use these casebooks.

The sampled material includes the prefaces and introductory chapters of all historical and present editions of the casebooks, and the remedies chapter of the current editions of the three casebooks in print. I chose to analyze the prefatory and introductory passages because they contain the most explicit statements of the editors' objectives and attitudes. I include one substantive chapter in order to compare what is said with what is actually done. I chose remedies because the subject matter incorporates realist and functionalist themes and because the decision about whether to include remedies first or last in a course has served as a longstanding proxy for debates between formalism and realism in the legal academy.<sup>35</sup> I have reviewed all published scholarly reviews of the Canadian casebooks and use these, selected reviews of contract law textbooks and other writings by casebook editors, and the introductions to contract law textbooks, to inform my analysis.<sup>36</sup>

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33. Methodologically, this study does not take "a macro approach to research." I focus more on the individual participants in legal education than I do on institutions, curricula, or markets. I also do not "study a setting and its participants from a particular critical stance, such as feminism and Marxism" or focus particularly on "historical, social, and cultural events that extend beyond the setting." Bailey, *supra* note 30 at 56. Compare HW Arthurs, "The Political Economy of Canadian Legal Education" (1998) 25:1 JL & Soc'y 14.

34. See generally, Anselm Strauss & Juliet Corbin, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (Thousand Oaks, Cal: Sage, 1998).

35. See Scott D Gerber, "Corbin and Fuller's Cases on Contracts (1942?): The Casebook That Never Was" (2003) 72:3 Fordham L Rev 595.

36. A significantly longer version of this study of Canadian contract law casebooks, incorporating more historical detail, is available on request.

## I. CRITICAL AND REALIST PERSPECTIVES IN CANADIAN CONTRACT LAW CASEBOOKS

One story of the Canadian contract law casebook might emphasize its American roots, portraying the first Canadian casebook, Falconbridge's *Law of Sales* in 1927, as an example of the importation of the US case method.<sup>37</sup> This Part makes a somewhat different point. It seeks to highlight not so much the affinity or subtle differences between the countries' approach to the case method,<sup>38</sup> but rather to detail the influence on the Canadian books of American ideas that constituted the "assault" on the formalist ideas ascribed to casebook editors of the late nineteenth and early twentieth century.<sup>39</sup>

The late 1970s is a flashpoint for the emergence of these ideas in Canadian casebooks. In 1978, two new casebooks came on the scene in Canada: *Swan and Boyle and Percy*. Each of these books has an extensive introductory chapter full of messages from American Legal Realism and subsequent critical theories of law, introductions that have been carefully edited up until their present editions. The third major casebook today, *Waddams*, traces its intellectual roots to 1977, the year that its editor, Stephen Waddams, published his realist textbook,<sup>40</sup> *The Law of Contracts*,<sup>41</sup> and completed his first major revision of *Milner* (3rd ed). This Part details the messages contained in the three casebooks, and in James Milner's original introduction.

Before proceeding, some numerical context informs the largely idea-driven analysis that follows. Of the seventy-five participants in my study, fifty-eight assigned a commercial casebook, ten used original compilations of materials, and seven used or adapted a noncommercial in-house casebook. Of the fifty-eight who used commercial casebooks, thirty-two (55.2 per cent) assigned *Boyle/Ben-Ishai and Percy*, seventeen (29.3 per cent) assigned *Waddams*, and nine

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37. See Angela Fernandez, "An Object Lesson in Speculation: Multiple Views of the Cathedral in *Leaf v. International Galleries*" (2008) 58:4 UTLJ 481 at 509.

38. See e.g. Edouard Lambert & Max J Wasserman, "The Case Method in Canada and the Possibilities of Its Adaptation to the Civil Law" (1929) 39:1 Yale LJ 1.

39. See Grant Gilmore, *Death of Contract* (Columbus, OH: Ohio State University Press, 1974) at 14-17, 43-44 (on Williston and formalism); Williston, *supra* note 5 at iii-iv (acknowledging his "indebtedness" to Langdell).

40. See Part I(B)(ii)(a), below.

41. SM Waddams, *The Law of Contracts* (Toronto: Canada Law Book, 1977) [Waddams, *Law of Contracts* 1st ed].

(15.5 per cent) assigned *Swan*.<sup>42</sup> Confidential sales data provided by the three publishers broadly confirms the relative weighting, with *Ben-Ishai and Percy* possessing a slightly greater market share than my numbers indicate. Between 2011 and 2016, approximately two out of every three commercial contract law casebooks sold in Canada was a *Ben-Ishai and Percy*, one in four was a *Waddams*, and one in ten was a *Swan*.<sup>43</sup>

#### A. SWAN

*Swan* is a good place to start for a few reasons. Because it sets out its realist messages so clearly, it provides a good intellectual basis for understanding the messages communicated in the other casebooks. Of the books, it is the most polemical; its explicit and powerful claims are particularly useful for review purposes. Where analogous claims are sketched in the other books, having foregrounded the *Swan* approach enables us to understand them in greater depth. Where the other books differ from *Swan*, the early immersion helps highlight the contrasts. Significant time is also spent here because unlike the other books, *Swan* does not demonstrate a host of contradictory views, and so it is not discussed in Part II.

But it is also *Swan*'s outlier status that justifies a substantial focus. Unique among the books, *Swan* translates her<sup>44</sup> theoretical commitment to realism

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42. For this metric, I count the casebook most recently assigned as of the date of first participation in my study (the interview date or, for non-interview participants, the first time they sent me their course syllabus). For most participants, this was the casebook assigned in the year of interview, but for the professors who were not currently teaching at the time of interview, it was the casebook most recently used. Most of these fall between the academic years 2012-13 and 2016-17; six were prior to 2011 (3 *Waddams*, 1 *Boyle & Percy*, 1 *Original*, 1 *Noncommercial*). If these five are removed from the calculation, the relative percentages are: *Ben-Ishai & Percy* 61.5 per cent (31 out of 52), *Waddams* 26.9 per cent (14 out of 52), *Swan* 17.3 per cent (9 out of 52). In all, between February 2013 and January 2017 I invited 109 current and former Canadian contract law professors to participate in my study. The 75 who did participate yields a participation rate of 68.8 per cent.

43. *Ben-Ishai & Percy* is the recommended casebook for the Federation of Law Societies of Canada's (FLSC) National Committee of Accreditation (NCA) examination in Contract Law, an examination that some foreign trained lawyers are required to take as a condition of being licensed in Canada. The FLSC has provided me with the number of annual sittings of the NCA Contract Law examination dating back to 2010. Casebook sales attributable to these sittings are not large enough to materially affect the ratio stated above.

44. Despite the fact that the book is a collaboration I attribute the casebook's ideas to Angela Swan individually for ease of communication. This is also justified given that she is the only individual who has remained an editor for all nine editions. However, it should be noted that Swan attributes the ideas equally to herself and Barry Reiter. See *Swan* 4th ed, *supra* note 21 at xxviii ("Neither of us now know who had which idea first. The work is a joint effort in the truest sense of the word"). Jakub Adamski replaced Reiter for the 9th edition.

into an operationalized methodological approach, focusing on the “role of the solicitor.”<sup>45</sup> As Part II demonstrates, the other books are characterized by a methodology in tension with their realist commitments. So, *Swan* innovates. But, *Swan* is not only the least adopted commercial casebook in Canada, it has also provoked hostile responses.<sup>46</sup> To make the general claim, as this article does, that the contradictions in the other casebooks suggest that there may be distinctive features of Canadian legal thought, *Swan*, the maverick outlier, serves as an instructive foil.

## 1. THE SWAN VISION

Irreducible to any singular influence and undoubtedly idiosyncratic, *Swan* nevertheless bears the influence of the American authors Corbin, Fuller, and Macneil. The section that follows details how these authors’ ideas have influenced *Swan*, how *Swan* has translated their ideas into the novel methodological focus on the solicitor’s perspective, and how the introductory and remedies chapters consistently execute this vision.

### I. THE REASONABLE EXPECTATIONS OF THE PARTIES

Unlike the other three books, *Swan* executes a vision of law that revolves around one central theme. This is the idea that the “fundamental purpose of contract law is the protection and promotion of expectations reasonably created by contract.”<sup>47</sup> This central idea bears the direct influence of the great American legal realist, Corbin, who titled the first section of his magisterial treatise, “The Main Purpose of Contract Law Is the Realization of Reasonable Expectations Induced by Promises.”<sup>48</sup>

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45. *Swan* 3rd ed, *supra* note 21 at xxxi.

46. Numerous authors have bristled at the ideas set out in the “theoretical companion” to the casebook. Hatherly, *supra* note 19 at 270. See e.g. Gerald Fridman, Book Review of *Studies in Contract Law* by Barry J Reiter & John Swan, eds, (1981) 26:2 McGill LJ 408; David Percy, Book Review of *Studies in Contract Law* by Barry J Reiter & John Swan, eds (1981) 59:4 Can Bar Rev 853; Brian Coote, Book Review of *Studies in Contract Law* by Barry J Reiter & John Swan, eds (1981) 19:2 UWO L Rev 357.

47. Barry J Reiter & John Swan, “Contracts and the Protection of Reasonable Expectations” in Barry J Reiter & John Swan, eds, *Studies in Contract Law* (Toronto: Butterworths, 1980) 1 at 6 [Reiter & Swan, “Reasonable Expectations”].

48. Corbin, *supra* note 5 at 1, quoted in Stephen A Smith, “The Reasonable Expectations of the Parties: An Unhelpful Concept” (2009) 48:3 Can Bus LJ 366 at 366. Corbin’s emphasis on pragmatism and “working rules” is also felt in Swan’s emphasis on usefulness. See Corbin, vol 1, *ibid* at IV-V.

A number of other commitments flow from this idea. These include the ideas that contract law, and law in general, is purposive, functional, and instrumental;<sup>49</sup> that contract law can be evaluated according to its “suitability” to actual relationships;<sup>50</sup> that legal institutions beyond courts, such as legislation and “administrative processes,” play a role in effecting change;<sup>51</sup> that it is important to look “below the surface” to “identify and assess ... principles and policies” that underlie cases and legislative instruments;<sup>52</sup> and, ultimately, that the purpose of legal study can serve an “intensely practical” function, that is, to recommend more effective rules of (contract) law.<sup>53</sup> These ideas, articulated in a “theoretical companion”<sup>54</sup> to the casebook in 1980, would grow and develop over successive editions. As discussed below, they are significantly influenced by the ideas, and casebooks, of Lon Fuller and Ian Macneil.<sup>55</sup>

## II. FUNCTIONAL REASONING, POLICY, AND CONFLICTING VALUES

The theoretical basis for much of *Swan*’s vision is a rejection of positivism, what Swan and Reiter alternatively describe as an understanding of law divorced from goodness or badness,<sup>56</sup> or the idea that one can “consider whether a particular rule of law exists or not, and discuss its application ... without making any inquiry into the rule’s function.”<sup>57</sup> Akin to Fuller’s expression that law is a “purposive ordering of human affairs,”<sup>58</sup> Swan and Reiter write, in the second edition of the casebook, that law is:

justified only in so far as it forwards or participates in the achievement of social values. ... It makes no sense to ask whether a rule exists as a separate inquiry from a consideration of the rule’s purpose and function. In fact, on this view a rule can really only be said to exist in so far as it does help to achieve some social goal.<sup>59</sup>

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49. Reiter & Swan, “Reasonable Expectations,” *supra* note 47 at 4. See also, Hatherly, *supra* note 19 at 271; Vincent, *supra* note 19 at 349.

50. Reiter & Swan, “Reasonable Expectations,” *supra* note 47 at 5.

51. *Ibid* at 4.

52. *Ibid* at 2. See also, Percy, *supra* note 46 at 854.

53. Reiter & Swan, “Reasonable Expectations,” *supra* note 47 at 4.

54. Hatherly, *supra* note 19 at 270.

55. *Swan* 1st ed, *supra* note 21 at vii.

56. Reiter & Swan, “Reasonable Expectations,” *supra* note 47 at 17.

57. *Swan* 2nd ed, *supra* note 21 at i.

58. Fuller & Perdue, “Reliance Interest 1,” *supra* note 5 at 52.

59. *Swan* 2nd ed, *supra* note 21 at li. Cf. *Swan* 6th ed, *supra* note 21 at xxii (“The law is a tool for achieving social, economic and political ends”).



This emphasis on functionalism is a typical expression of “policy” reasoning, the idea that law is a means to an end, that was a definitive feature of early American Legal Realism.<sup>60</sup> Also reflecting the consensus in American legal thought (catalyzed by Fuller) that legal reasoning is typified by the balancing of “conflicting considerations,”<sup>61</sup> the *Swan* editors repeatedly encourage their students to think critically about the role that judges have to play in balancing competing values.<sup>62</sup>

### III. THE SOLICITOR’S PERSPECTIVE

As time goes on, *Swan* retains these realist ideas but treats them less theoretically.<sup>63</sup> Instead, they become operationalized into the signature feature of *Swan* today—a focus on the solicitor’s perspective. This perspective urges the student to place him- or herself in a planning state of mind, focused on avoiding litigation. The idea surfaces throughout the introduction and the book as a whole. It is heavily informed by the editors’ move from academia into practice, and the ideas of Macneil and Fuller.

The solicitor’s perspective derives from a key critical message of the book, that the paradigm of adjudication is inadequate for a complete understanding of contract law. Early in the introductory chapter, the authors set the stage for this iconoclastic vision:

The consequence of a focus on cases ... tends to encourage one to think that we are concerned only about what happened (or might happen) in court: that every problem and issue should be approached as if it were going to be decided by a court. We believe that this introduces an unfortunate bias in developing an understanding of the law of contracts. The law of contracts is about agreements. ... Any contractual dispute should therefore be regarded not as a common or everyday event, but as an unfortunate aberration. It is a much more important function of lawyers to keep their clients out of court than it is to engage in the process of litigation once the parties have chosen to bring their dispute before a court.<sup>64</sup>

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60. Duncan Kennedy, “From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s ‘Consideration and Form’” (2000) 100:1 Colum L Rev 94 at 113 [Kennedy, “From Will Theory”]. See also Felix S Cohen, “Transcendental Nonsense and the Functional Approach” (1935) 35:6 Colum L Rev 809.

61. See Kennedy, “From Will Theory,” *supra* note 60 at 104.

62. See e.g. *Swan* 3rd ed, *supra* note 21 at xxxii-xxxiii; *Swan* 4th ed, *supra* note 21 at xxx.

63. For example, the third edition of *Swan* omits a three-page section on “Philosophical Ideas About Contract” that appeared in the second edition. *Swan* 3rd ed, *supra* note 21; *Swan* 2nd ed, *supra* note 21 at xlvii-l.

64. *Swan* 3rd ed, *supra* note 21 at xxx-xxxi.

This idea, and the related legal-process idea that the lawyer's role is to choose the most appropriate "form of social ordering" for the circumstances, was a favourite of Fuller's, who expressed it both theoretically<sup>65</sup> and in his own contract law casebook.<sup>66</sup>

Closely related to the rejection of the backwards-looking, pathological perspective of litigation and adjudication is the embrace of a forward-looking, "healthy" vision of contractual relations.<sup>67</sup> "Many solicitors," the editors write, "spend a good deal of their time helping their clients manage the contractual relations they are in so that the relations run smoothly and disputes are avoided or dealt with before they become serious."<sup>68</sup> This represents an embrace of the theoretical ideas of Ian Macneil, who emphasizes contractual relations over discrete contracts,<sup>69</sup> and construes planning<sup>70</sup> and exchange as central organizing features of contract law.<sup>71</sup>

The translation of these theoretical ideas into the focus on solicitors' tasks is undoubtedly informed by the editors' professional trajectory. Reiter had left the University of Toronto for practice as of the third edition and Swan had done so by the fourth. In the preface to the fourth edition, they remark how they are "pleased to find that our ideas seem to work very well when applied to the practical problems of advising clients and helping to make contractual relations work."<sup>72</sup> After this time, the solicitor's perspective receives new additional treatment in

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65. Lon L Fuller, "The Forms and Limits of Adjudication" (1978) 92:2 Harv L Rev 353 at 357 [Fuller, "Forms and Limits"]. Kennedy refers to this article as Fuller's "contribution to legal process thinking." See David Kennedy, "Lon L. Fuller" in Fisher & Kennedy, eds, *supra* note 8 at 217. See also Lon L Fuller, "What the Law Schools Can Contribute to the Making of Lawyers" (1948) 1:2 J Legal Educ 189 [Fuller, "Law School"].

66. See Lon L Fuller & Melvin Aron Eisenberg, *Basic Contract Law*, 3rd ed (St. Paul, Minn: West, 1972) at 93-97.

67. See e.g. Swan 9th ed, *supra* note 21 at s 1.40.

68. Swan 7th ed, *supra* note 21 at xxxii.

69. Ian R Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (New Haven: Yale University Press, 1980) at 10 [Macneil, *New Social Contract*]. See e.g. Swan 2nd ed, *supra* note 21 at xlv-xlvi; Swan 7th ed, *supra* note 21 at xxxi-xxxii. Mention of the distinction was removed in intervening editions.

70. Ian R Macneil, *Contracts: Exchange Transactions and Relations – Cases and Materials*, 2nd ed (Mineola, NY: Foundation Press, 1978) at ss 1.3.16ff ("Planning Through Contract") [Macneil casebook].

71. Macneil, *New Social Contract*, *supra* note 69 at 4. See e.g. Swan 3rd ed, *supra* note 21 at xxvii.

72. Swan 4th ed, *supra* note 21 at xxviii. The editors also write that "almost none of the ideas that underlay the previous editions" have changed. *Ibid.*

most successive editions.<sup>73</sup> As the years go by and the casebooks increasingly incorporate references to clients' actual practices and interests, the book begins to double as a work of socio-legal scholarship, marshaling actual experience to generate theory.<sup>74</sup>

#### IV. FAIRNESS AND DECENCY

Not only does the solicitor's perspective implement the skepticism of adjudication and focus on planning and contractual relations, but it becomes a framework through which the editors can transmit some higher ideals about the justice system and legal profession. In speaking directly to students, they connect the idea of legal practice to a concern with fairness, decency, and human dignity:

[T]he most important aspect of any study of the law of contracts (or of any area of the law, for that matter) is the ability to retain a sense that the law is part of human life and that it must always respect human dignity. We have to retain an almost childlike faith that things *must* be fair. ... Without this faith in fairness, law can easily become little more than an implacable and impersonal set of rules divorced from human values and based on some abstract idea of the need for certainty and predictability. Do not become cynical: there is too much at stake to risk the dangers of an unconcern for fairness and decency. Do not fall into the trap of thinking that it is somehow 'unlawyerly' to be passionately concerned for justice, or of believing that 'to think like a lawyer' means that one has to forget that one person who, until law school, *did* care that results be fair and that people behave decently towards each other.<sup>75</sup>

By inflecting what is "lawyerly" with a sense of ethics, the editors complete a picture of a lawyer as possessing a wide variety of skills and perspectives. The theoretical ideas of functionalism, multiple forms of social ordering, contractual relations, and empiricism translate into a view of the solicitor as a forward-looking facilitator of contractual relations, adept at planning and problem-solving. These skills considerably exceed the standard focus on parsing judicial opinions that we see in the other casebooks. Moreover, the editors consistently execute this perspective and the related ideas in the remedies chapter.

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73. See *Swan* 3rd ed, *supra* note 21 at xxxi, xxxiii; *Swan* 4th ed, *supra* note 21 at xxxiv; *Swan* 5th ed, *supra* note 21 at xxviii; *Swan* 6th ed, *supra* note 21 at xxix-xxx; *Swan* 7th ed, *supra* note 21 at xxxii; *Swan* 9th ed, *supra* note 21 at s 1.41 (adding in a reference to "advising clients").

74. Cf Macaulay, "Non-Contractual Relations," *supra* note 5.

75. *Swan* 3rd ed, *supra* note 21 at xxxiii.

## 2. THE SWAN REMEDIES CHAPTER: A CONSISTENT SET OF REALIST MESSAGES

Like Fuller, who famously “innovated” the placement of remedies at the beginning of the casebook,<sup>76</sup> the *Swan* editors place the subject matter immediately following the introductory chapter. In explaining their choice, they reinforce the solicitor’s role in prospective planning and avoiding litigation, and the importance of contractual relations, all against the background of an implicitly empirical claim about what lawyers actually do:

Lawyers spend comparatively little time worrying about the process of contract creation. They spend much more of their time worrying either about the risks that the deal creates for their clients and the ways by which those risks may be avoided, controlled or allocated, or in negotiating the deal and keeping the arrangements working smoothly when the parties are in the deal or relation and need to co-operate.

It makes more sense to start the study of contract law by considering what might happen when things go wrong, what the risks of non-performance might be, where they come from and what one can do about them. Once one understands the rights that a party may have if a contract is not performed and the consequences of non-performance of a contract, one has a better grasp of the problems that making a deal might create.<sup>77</sup>

The chapter goes on to de-centre the role of adjudication. Before any discussion of the cases, the *Swan* editors place the idea of remedies in their broadest possible ambit, analogous to the legal-process technique of cataloguing multiple forms of social ordering. They show how “remedies” can include criminal sanctions, formal and informal exclusion from a business or trade, being “publicly labeled as one who did not keep promises,” a court declaration that a contract has been breached, orders of specific performance, and, finally, court-awarded damages.<sup>78</sup>

They also emphasize the pragmatic and functional view, at times with highly “practical” justifications—lawyers need to understand remedies so that they can decide whether “the amount likely to be recovered makes it worth starting or defending an action”<sup>79</sup>—other times with more lofty references to history and legal theory. They implicitly bolster the preference for “remedies first” by alluding

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76. Fuller, *Basic Contract Law*, *supra* note 13. On the book as an “innovation,” see Gerber, *supra* note 35 at 625; Farnsworth, *supra* note 10 at 1436.

77. *Swan* 9th ed, *supra* note 21 at ss 2.1-2.2.

78. *Ibid* at s 2.3.

79. *Ibid* at s 2.8.

to the Blackstonian formulation that there is “no right without a remedy.”<sup>80</sup> And they critique the theory that “law is a forum ... for a confrontation between parties with ‘rights-based’ claims,” instead proposing an alternative that emphasizes “mutual duties and good faith” and “the expectations that the relation has encouraged.”<sup>81</sup> They show contempt for the “doctrinal purity of the law,” preferring instead a focus on what “works.”<sup>82</sup>

In addition to these more lengthy and explicit passages, the chapter is replete with other comments that reinforce the authors’ commitment to their view of law, which includes an appreciation of context,<sup>83</sup> the importance of the reasonable expectations of the parties,<sup>84</sup> functionalism,<sup>85</sup> and the role of the solicitor.<sup>86</sup> The functionalist view is reinforced by the organization of the chapter, whose main subject headings tend toward practical considerations instead of doctrinal divisions.<sup>87</sup>

All of these examples generate a chapter in which the influences of Corbin, Fuller, and Macneil are felt equally strongly, if not more so, as compared with the Introduction. This consistency is unique among the three casebooks, as is the fact that these theoretical commitments are translated into a distinctive vision of the lawyer’s role as forward-looking, problem-solving, and focused on contractual relations.

80. *Ibid* at s 2.266. Cf William Blackstone, *Commentaries on the Laws of England*, 15th ed (London: Cadell & Davies, 1809) vol 3 at 109 (“it is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury it’s [sic] proper redress”).

81. *Swan* 9th ed, *supra* note 21 at s 2.435.

82. *Ibid* at s 2.456.

83. See e.g. *Swan* 9th ed at s 2.338 (“Throughout these materials we will confront the failure of the law to take into account the context of the contract”); *ibid* at ss 2.27-2.32, 2.33, 2.85, 2.98, 2.122, 2.125(b), 2.3.7, 2.332-2.334, 2.339, 2.340, 2.402.

84. See e.g. *ibid* at s 2.125(a) (“If the focus of our inquiry is at least in part on what Cornwall Gravel reasonably expected from Purolator”); *ibid* at ss 2.331, 2.338, 2.435, 2.449(a). The theme also appears frequently in the case excerpts. See e.g. *ibid* at 115, 140, 159, 233.

85. See e.g. *ibid* at s 2.376 (“The question is, as always, what values and interests should the law support? What is the purpose of the legal rules about remedies?”); *ibid* at ss 2.63, 2.89, 2.208, 2.389, 2.402, 2.429.

86. See e.g. *ibid* at s 2.148 (the solicitor is “professionally concerned to ‘foresee’ or worry about the consequences of a breach of contract”); *ibid* at ss 2.18, 2.24, 2.44, 2.47, 2.82, 2.84, 2.108, 2.114, 2.126, 2.141, 2.283, 2.342, 2.385, 2.448(a), 2.490, 2.513(2), 2.513(3).

87. See *ibid* at paras 2.1 (“Introduction”), 2.2 (“The Compensation Principle”), 2.3 (“Some Problems in Awarding Damages”), 2.4 (“Equitable Remedies”), 2.5 (“Interest and the Date for Assessing Damages”), 2.6 (“Recovery of the Defendant’s Gains or Restitutionary Remedies”), 2.7 (“Reasonableness in the Face of Contract Breach: Accounting for Gains Arising from a Breach”).

The remainder of this Part shows how many of these realist and critical ideas imported from American authors figure prominently in the other casebooks. But as the second Part will show, the other books fail to translate these commitments into their vision of legal reasoning. It is the nature of that contradiction that generates the analysis that follows in Part III.

## B. WADDAMS AND MILNER

The *Waddams* textbook and its predecessor, *Milner*, both bear the influence of the critical traditions of American legal thought—although as between the two casebooks, the influences are distinct, as are the means by which they manifest. While *Milner* has been out of print for over three decades, it remains relevant both as evidence of an intermediate intellectual link between Fuller and Angela Swan, and for the distance that can be observed between Milner's views and those of Waddams. Milner emphasizes the legal-process views of Fuller, whereas Waddams departs from these, showing a closer affinity to early American Legal Realists.

### 1. MILNER

James Bryce Milner published the first edition of his casebook in 1963. After Milner's death in 1969, Waddams edited successive editions in 1971, 1977, and 1985. In an introduction initially written in 1963, updated in 1968, and preserved throughout all four editions of the book, Milner sets out a "highly personal" approach to the study of contract law.<sup>88</sup> This approach borrows heavily from the legal-process writings of Fuller. It undermines the centrality of adjudication; communicates skepticism about the Langdellian case method; and, like *Swan*, emphasizes the lawyer's role in being a practical solver of clients' problems.

The "great debt"<sup>89</sup> that Milner claims he owes to Fuller is best indicated by Milner's repeated claims—strikingly reminiscent of *Swan's*—that legal education unduly emphasizes case law.<sup>90</sup> That emphasis, for Milner, communicates a mistaken impression of what law is, what lawyers do, and what clients want. For Milner, cases do not serve as building blocks that "fit neatly into a little wall of law,

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88. *Milner* 1st ed, *supra* note 20 at xix.

89. *Ibid* at xx.

90. Compare *ibid* at xi ("First year law students can too easily get the impression that life in the law is just one continuous lawsuit. Case study falsely emphasizes this impression. The cases are almost always cases in courts, and the constant reading of cases may tend to drive out of mind the other areas in which law is equally operative"); *Swan* 3rd ed, *supra* note 21 at xxx-xxxi ("The consequence of a focus on cases . . . tends to encourage one to think that we are concerned only about what happened (or might happen) in court").

snugly and certainly;<sup>91</sup> instead, law is an exercise in serving human purposes, and justice the task of selecting which purposes to suppress and which to promote.<sup>92</sup>

This emphasis on human purposes leads to a practical and prospective vision of the lawyer's work, foreshadowing *Swan's* solicitor's approach: Instead of asking what a case stands for (a question that is a "virus" in Milner's words), the "important question is: What is to be *done* with [it]?"<sup>93</sup> Likewise, a client is unlikely to ask what the law "is" but rather what the client can "do, or not do in particular circumstances."<sup>94</sup> The lawyer's task is, accordingly, to help the client "avoid trouble."<sup>95</sup> The lawyer accomplishes this best by adopting a forward-looking state of mind more akin to the legislative process than the adjudicative:

Their professional action will be based on their predictions, but it may take the form of, for example, drafting clauses in a contract, persuading an administrative official to vary a regulation, or a legislative committee to recommend an amendment to a statute, or organizing a new corporation. All of these activities are in a sense legislative, rather than adjudicative, and they justify, in my view, an even greater emphasis on the legislative area than our legal education presently offers.<sup>96</sup>

The idea that legal education ought to emphasize the legislative process at least in equal proportion to the adjudicative is directly attributable to Fuller. A year before Milner would go to Harvard for his graduate legal education (1949), and shortly after Fuller's time authoring an influential internal report at Harvard Law School on legal education to similar effect,<sup>97</sup> Fuller published the article, "What the Law Schools Can Contribute to the Making of Lawyers."<sup>98</sup> In it, he advocated for a new conception of legal education focused on legal process: Law schools should give equal emphasis to the two paradigmatic legal processes—adjudication, which had become the default focus of law schools, and legislation (which includes not only "planning and drafting of statutes" but also "negotiation and drafting of contracts and other private documents").<sup>99</sup> Milner not only read this article while at Harvard, but organized a graduate student

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91. Milner 1st ed, *supra* note 20 at vii.

92. *Ibid* at xvii.

93. *Ibid* at vii [emphasis added].

94. *Ibid* at xv.

95. *Ibid* at xvi.

96. *Ibid* at xvii.

97. See Robert S Summers, *Lon L. Fuller* (Stanford, Cal: Stanford University Press, 1984) at 15.

98. *Supra* note 65.

99. *Ibid* at 193.

reading series at which Fuller presented it.<sup>100</sup> Milner and Fuller would remain in correspondence for the subsequent two decades, and Milner would include this article in a list of recommended Fuller readings he shared with members of the Canadian judiciary.<sup>101</sup> Milner would have also encountered a series of related<sup>102</sup> legal-process ideas in the Legislation Seminar he took with Henry Hart, architect of the Legal Process school.<sup>103</sup> Indeed, Milner's two highest grades were in Fuller's Jurisprudence seminar and in Hart's course.<sup>104</sup>

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100. Memorandum from James Milner to "Fellow Graduate Students" (28 November 1949) York University Libraries, Clara Thomas Archives & Special Collections, James B Milner fonds (1992-014/005(161)) ("On Monday night Professor Fuller will lead off with observations on what law schools can contribute to the making of lawyers"); Letter from James Milner to Erin Griswold (Dean of Harvard Law School) (27 March 1950) York University Libraries, Clara Thomas Archives & Special Collections, James B Milner fonds (1992-014/005(161)) ("We owe a particular debt to Professor Fuller, who not only started the ball rolling at the first meeting, at which we discussed his article 'What the Law Schools Can Contribute to the Making of Lawyers,' but who also gave us continuous encouragement and advice throughout the year").
  101. Letter from James Milner to Justice JL McLennan (19 Dec 1956) York University Libraries, Clara Thomas Archives & Special Collections, James B Milner fonds (1992-014/005(161)). Fifteen months later, Milner wrote, apparently unsolicited, to McLennan again, updating the bibliography. Letter from James Milner to Justice JL McLennan (27 March 1958) York University Libraries, Clara Thomas Archives & Special Collections, James B Milner fonds (1992-014/005(161)). Justice McLennan replied, noting that he shared the bibliography with Justice Rand of the Supreme Court of Canada. Letter from Justice JL McLennan to James Milner (31 March 1958) York University Libraries, Clara Thomas Archives & Special Collections, James B Milner fonds (1992-014/005(161)).
  102. See William N Eskridge Jr & Philip P Frickey, "The Making of *The Legal Process*" (1994) 107:8 Harv L Rev 2031 at 2039-40.
  103. See generally Henry M Hart Jr & Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Westbury, NY: Foundation Press, 1994).
  104. Milner received his highest grade, a 39.5 out of 50, in Fuller's Jurisprudence Seminar. His second highest grade (39 out of 50) was in Hart's Legislation seminar. See Harvard Law School, Examination Record of James Bryce Milner (June 1950) York University Libraries, Clara Thomas Archives & Special Collections, James B Milner fonds (1992-014/005(161)). Hart seems to have made an impression on Milner. As Milner wrote to Caesar Wright, "Hart's idea is that legislation is a fancy name for legal method. I thought I was back in jurisprudence for five weeks." Letter from James Milner to Caesar Wright (4 May 1950) York University Libraries, Clara Thomas Archives & Special Collections, James B Milner fonds (1992-014/005(161)). In an earlier letter, Milner told Wright that he viewed "Legislation as a jurisprudential and public law subject." Letter from James Milner to Caesar Wright (20 April 1950) York University Libraries, Clara Thomas Archives & Special Collections, James B Milner fonds (1992-014/005(161)).



The influence of this article, which applies Fullerian concerns with multiple “forms of social ordering”<sup>105</sup> and Hartian concerns of “institutional process” to legal education,<sup>106</sup> is felt in Milner’s own distinction among legal processes and in his criticism of legal education as unequally weighted toward the adjudicative.<sup>107</sup> It can also be seen in the 1968 update to the casebook introduction (published posthumously in *Milner* 2nd ed), in which Milner reiterates the theme of institutional competence and his preference for the legislative.<sup>108</sup> Intellectually speaking, Milner effects a transition from Fuller’s (and Hart’s) legal-process ideas to Swan’s focus on the solicitor: the presence of multiple forms of social ordering require an emphasis on the legislative mode, which embodies a forward-looking exercise in serving human purposes.<sup>109</sup> This prospective activity translates into the practical objective of helping clients avoid trouble, and a view of law as contingent<sup>110</sup> and instrumental to social ends (solving the “social problems of our time”).<sup>111</sup>

## 2. WADDAMS

One aspect of this intellectual lineage—Milner overlapped with Swan on faculty at the University of Toronto for four years<sup>112</sup>—was apparently frayed once Waddams assumed ownership over the editorial vision of *Milner*. Unlike Milner

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105. Fuller, “Forms and Limits,” *supra* note 65 at 357ff.

106. Eskridge & Frickey, *supra* note 102 at 2040.

107. *Milner* 1st ed, *supra* note 20 at xi.

108. *Milner* 2nd ed, *supra* note 20 at xxxi.

109. See *Swan* 1st ed, *supra* note 21 at vii (“Preface”). Swan acknowledges both Fuller’s influence and that of Hart (“Another very important influence on my thinking was the ‘Legal Process’ materials of Hart [& Sacks] ... They provided me with a vehicle for fitting my views on the substantive law, initially of Conflicts and then Contracts, into a functioning legal structure.” Swan “never met Fuller. ... [She] had hoped to meet him when he came to Ottawa once but family responsibilities prevented that and he died not long after.” Email correspondence from Angela Swan to author (19 October 2016).

110. *Milner* 1st ed, *supra* note 20 at xvi, xvii (referring to the Cardozo quote that “law never *is*, but is always about to be” and calling it a “great idea”).

111. *Milner* 2nd ed, *supra* note 20 at xxx. Cf *Swan* 9th ed, *supra* note 21 at s 1.7 (“Law is the science of getting from here to there”).

112. After completing her BCL at Oxford, Angela Swan began as an Assistant Professor at the University of Toronto in 1965. Milner passed away in 1969. See Aird & Berlis LLP, “Bio, Angela Swan,” online: <[www.airdberlis.com/people/bio/angela-swam](http://www.airdberlis.com/people/bio/angela-swam)>. Swan “can remember some conversations with [Milner] about Fuller,” though they “never did talk much about Contracts.” Email correspondence from Angela Swan to author (19 October 2016).

and Swan, Waddams expresses no skepticism about adjudication. In other ways, however, he demonstrates a shared affinity with his colleagues.<sup>113</sup>

# I. A PRESENT-DAY CORBIN: MESSAGES FROM WADDAMS'S TEXTBOOK

Waddams begins to add his personal touch to *Milner* beginning with the third edition.<sup>114</sup> He reorganizes the materials around the idea of a bargain, places a greater emphasis on reliance, and adds a new thematic chapter on the protection of weaker parties.<sup>115</sup> In all of this, the casebook incorporates, and begins to resemble, the approach of his recently published textbook, *The Law of Contracts*.<sup>116</sup> Heralded as the arrival of "substantial critical analysis" to the Canadian contract law scene,<sup>117</sup> a "success[ful]" attempt to "emulate Corbin,"<sup>118</sup> *The Law of Contracts* emphasizes the concern for the function of rules over their form,<sup>119</sup> for what judges do, and for policy analysis. These ideas surface both in substantive and prefatory remarks.

The textbook draws on an earlier article, "Unconscionability in Contracts."<sup>120</sup> In it, Waddams argues that

[t]he law of contract, when examined for what the judges do, as well as for what they say, shows that relief from contractual obligations is in fact widely and frequently given on the ground of unfairness, and that general recognition of this ground of relief is an essential step in the development of the law.<sup>121</sup>

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113. Waddams, for example, participated in Reiter & Swan, *Studies in Contract Law*, *supra* note 47. See Hatherly, *supra* note 19 at 270 (Waddams and Swan "partake of a common philosophical perspective").

114. See *Milner* 3rd ed, *supra* note 20 at vii (identifying the "significant change[s]" in the book); *Milner* 2nd ed, *supra* note 20 at Preface, unnumbered page ("the general object of the revision has been to bring the book up to date").

115. *Milner* 3rd ed, *supra* note 20 at vii.

116. Waddams, *supra* note 41.

117. DA Soberman, Book Review of *The Law of Contracts* by SM Waddams, (1979) 17 UWO L Rev 314 at 315. See also Hugh Beale, Book Review of *The Law of Contracts* by SM Waddams, (1980) 15 J Soc't Pub Tchrs L ns 139 at 139, 140. But see PFP Higgins, Book Review of *The Law of Contracts* by SM Waddams, (1979) 42:2 Mod L Rev 239 at 239 ("The lay-out of the book appears to follow the orthodox lay-out of the established books on the subject").

118. Soberman, *supra* note 117 at 315.

119. See Beale, *supra* note 117 at 140.

120. SM Waddams, "Unconscionability in Contracts" (1976) 39:4 Mod L Rev 1. See Soberman, *supra* note 117 at 317 (the textbook chapter is "drawn from" the article); Beale, *supra* note 117 at 140.

121. See Waddams, "Unconscionability in Contracts," *supra* note 120 at 1.

This intellectual strategy—conducting a comparative study of what judges do to argue both a descriptive and prescriptive point about a principle—is remarkably similar to that employed by Fuller and Perdue in their seminal articles on the reliance interest.<sup>122</sup> Like the Fuller and Perdue articles, described as “perhaps the single most influential piece of Realist doctrinal work,”<sup>123</sup> this strategy “disaggregat[es] and contextualize[s]” an issue and results in a “consequentialist policy orientation.”<sup>124</sup>

Waddams develops such themes in the preface to his textbook. He writes that the very “aim” of the book is to look “beyond surface rules of contract law to the conflicting principles that lie beneath.”<sup>125</sup> This highlights the “conflicting values” at play in judicial decisions<sup>126</sup> and helps to analyze the “changes that have occurred [in contract law] ... with a view to suggesting what further changes seem desirable.”<sup>127</sup> With the emphasis on underlying values, “conflicting considerations,” and policy reasoning, the preface to the textbook champions three key features of American Legal Realism.<sup>128</sup> These presumably not only operate subconsciously on casebook editorial choices but are also incorporated by virtue of the numerous references to the textbook added in subsequent editions.<sup>129</sup>

## II. REALISM AND FUNCTIONALISM IN THE REMEDIES CHAPTER OF WADDAMS

The realist and functional themes surface in the remedies chapter, but unlike *Swan*, which explicitly and emphatically presents them as a preferred perspective, their presentation is both implied and non-polemical.

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122. See *e.g.* Fuller & Perdue, “Reliance Interest 2,” *supra* note 5 at 373 (“We have attempted to bring together for comparative study a series of situations in which judicial intervention has been (or in our opinion, should be) limited to a protection of what we have called the reliance interest”), 418 (“the contractual reliance interest receives a much wider (though often covert) recognition in the decisions than it does in the textbooks”).

123. Morton J Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992) at 184.

124. *Ibid.*

125. SM Waddams, “Preface to the First Edition,” reproduced in SM Waddams, *The Law of Contracts*, 6th student ed (Toronto: Canada Law Book, 2010) at vii.

126. *Ibid.*

127. *Ibid.* at viii.

128. See Kennedy & Fisher, *supra* note 8; Kennedy, “From Will Theory,” *supra* note 60.

129. Milner 4th ed, *supra* note 20 at vii. The practice of referring to his textbook continues through to the present edition. See *e.g.* Waddams 5th ed, *supra* note 22 at 32, 35, 79, 89, 106, 129, 135, 152, 154.

As in *Swan*, the *Waddams* editors place the remedies chapter at the beginning of the book, although unlike *Swan* they do not articulate the rationale for this.<sup>130</sup> There are, however, numerous explicit references to the functional theme. An excerpt from Fuller and Perdue's reliance interest article<sup>131</sup> is the first excerpt of the chapter, and the few commentaries that exist highlight the functionalist subjects of unjust enrichment<sup>132</sup> and the constructive trust.<sup>133</sup> Occasionally, notes and questions ask either explicitly or by implication for students to reason about policy.<sup>134</sup>

Moreover, editorial choices highlight rules as contingent upon place, circumstance, or history, suggesting that underlying principles are more important than particular rule formulations. The first seven cases of the chapter, for example, come from England, Oregon, Ontario, New Hampshire, and Minnesota, with a note to a Kentucky case. Examples from other jurisdictions are often raised to demonstrate alternative formulations,<sup>135</sup> as are dissenting and concurring opinions.<sup>136</sup> The inclusion of the historical developments of rules<sup>137</sup> and the legal system<sup>138</sup> amplifies the importance of context, as do the instances where the excerpts of cases are longer than in *Swan*,<sup>139</sup> the paraphrasing of facts

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130. Indeed, the authors specifically write that they have designed the casebook "to be suitable for dealing with the material in several different orders," whether starting with formation, remedies, or the theoretical perspectives. *Waddams* 5th ed, *supra* note 22 at iii.

131. *Supra* note 5.

132. *Waddams* 5th ed, *supra* note 22 at 158.

133. *Ibid* at 154.

134. See *e.g. ibid* at 53, 171 ("on the basis of what policy considerations can the recovery of profits made by Blake be justified?").

135. See *e.g. ibid* at 53, 87 (different jurisdictions decide differently on whether the contract as a whole must be for peace of mind in order to award damages for mental distress), 122, 157.

136. See *e.g. ibid* at 120, 152.

137. See *e.g. ibid* at 55-6. Sometimes the cyclical nature of history is invoked to show how old rules may lose and regain favour at different historical moments. See *e.g. ibid* at 158.

138. See *e.g. ibid* at 121 (history of the distinction between law and equity), 145 (origins of the tort of inducing breach of contract).

139. See *e.g. ibid* at 75ff (including Baroness Hale's decision in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)*, [2009] 1 AC 61 (HL)), 145-151 (reproducing a long excerpt in *Wroth v Tyler*, [1974] Ch 30, [1973] 1 All ER 897, including many facts not germane to the ratio). By contrast, *Swan* paraphrases *Wroth v Tyler* in five paragraphs. *Swan* 9th ed, *supra* note 21 at ss 2.410-2.414. See also *Waddams* 5th ed, *supra* note 22 at 161 (providing a longer excerpt of *Attorney General v Blake*, [2000] UKHL 45, [2000] 4 All ER 385 than in *Swan*, one that provides more facts and context than does *Swan*'s paraphrasing of the facts. *Swan* 9th ed, *supra* note 21 at 247.

is more detailed and colourful than is necessary,<sup>140</sup> and a postscript is provided about what happened after the resolution of the case.<sup>141</sup>

### III. SUMMARY: AMERICAN LEGAL THOUGHT IN *WADDAMS*

Among the various techniques of legal thinking from the “critical” canon of American legal thought, early realist concerns with underlying values, functional reasoning, and policy are probably the best represented in *Waddams*. While the lack of explicit commentary makes this harder to discern, the editorial choices and occasional references imply a commitment to functionalism. In addition, the influence of his more explicit textbook is evident throughout: both by virtue of explicit cross-references and by virtue of the fact that many contract law professors consider Waddams to be the casebook’s controlling editor.<sup>142</sup> *Waddams* is still very much Waddams’s, who still reproduces his realistic preface to the First Edition in the current edition of his textbook.<sup>143</sup>

#### C. *BOYLE/BEN-ISHAI AND PERCY*

Compared to *Swan* and *Waddams*, *Boyle/Ben-Ishai and Percy* is more self-consciously collaborative and pan-Canadian. It took root following a conference of the Canadian Association of Law Teachers in the 1970s, “inspired by a widely held feeling that there was a need for a national casebook.”<sup>144</sup> David Percy, of the University of Alberta, and Christine Boyle (of Windsor, then Dalhousie, then the University of British Columbia) assumed joint editorship of the book, with contributing editors of the other chapters representing the

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140. See e.g. *Waddams* 5th ed, *supra* note 22 at 112 (thoughtful paraphrasing of the facts in *White & Carter (Councils) v McGregor*, [1962] AC 413 (HL(Scot))), 141 (providing some colourful details about *Warner Brothers Pictures v Nelson*, [1937] 1 KB 209, [1936] 3 All ER 160 [*Warner Bros*] derived from Bette Davis’s autobiography, *The Lonely Life*).

141. See e.g. *ibid* at 44, reporting a post-judgment settlement in *Groves v John Wunder Co* (1939), 286 NW 235, 205 Minn 163 (SC) [*Groves*].

142. See e.g. Interview of Instructor 017 (26 February 2013) at lines 532-33 (“I think of the [*Waddams* casebook] as mostly Stephen’s”; Interview of Instructor 029 (28 February 2014) at lines 525-26 (“I have been using Stephen’s casebook ... ever since I started editing my chapter in it”); Interview of Instructor 044 (10 April 2014) at lines 85-86 (“I take Steve Waddams’ volume ... he has all his co-authors”).

143. Waddams, “Preface to the First Edition,” *supra* note 125.

144. *Ben-Ishai & Percy* 9th ed, *supra* note 23 at v. Variants of this formulation appear in all editions.

majority of common law faculties throughout the country.<sup>145</sup> In the eighth edition, Stephanie Ben-Ishai of Osgoode Hall Law School replaced Boyle. She and David Percy took joint responsibility for the introductory chapter. Ben-Ishai also inherited the remedies chapter from David Mullan, who had inherited it from David Percy in the sixth edition.

The introductory chapter under Boyle's authorship celebrates a somewhat broader range of realist and critical voices than those canvassed in *Swan* and *Waddams*. That introduction, originally written by Boyle and revised by her up until the seventh edition,<sup>146</sup> incorporates the influences of the American Legal Realists and their descendants: law and economics, critical legal studies, and socio-legal theorists.<sup>147</sup> Also figuring prominently are perspectives from feminism and critical race theory and, reflecting a distinctively Canadian sensibility, references to First Nations people. When Ben-Ishai and Percy took over the chapter for the eighth and ninth editions, many of these perspectives were retained, although the presence of feminism and First Nations messages declined. In their place was a greater emphasis on substantive equality. In Ben-Ishai's remedies chapter, realist commitments also surface.

## 1. THE BOYLE INTRODUCTION

### I. AMERICAN LEGAL REALISM ...

The chapter opens with comments and quotes that serve to undermine and render historically contingent the classical vision of law. Students are immediately told that law is "not made up of a static body of rules," and the first section quotes from Gilmore's argument in *The Death of Contract* that contract law is characterized by "alternating rhythms of classicism and romanticism."<sup>148</sup> The chapter discusses underlying values: students should not study law "without discussion of the value judgment inherent in any judicial discussion of legislative

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145. For example, the first edition lists fifteen different contributors from eight Canadian law schools and one Canadian Department of Law. *Boyle & Percy* 1st ed, *supra* note 23 at iii. The ninth edition lists 9 different chapter editors from six different Canadian law schools. *Ben-Ishai & Percy*, *supra* note 23. The University of Toronto, where both Swan's and Waddams's academic careers were headquartered, is not represented in any of the 9 editions.

146. The introduction was attributed to Christine Boyle in *Boyle & Percy* 6th ed, *supra* note 23 at v-vi. Prior to that there was no attribution.

147. For the lineage between legal realism and subsequent schools of thought, see Joseph William Singer, "Legal Realism Now," Review Essay of *Legal Realism at Yale: 1927-1960* by Laura Kalman, (1988) 76:2 Cal L Rev 465 at 465; Anthony T Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge, Mass: Belknap Press, 1993), c 4.

148. *Boyle & Percy* 7th ed, *supra* note 23 at 2 (quoting Gilmore, *supra* note 39 at 102).

rule,”<sup>149</sup> and should look “behind” the words of judges.”<sup>150</sup> The realist rejection of the public/private divide<sup>151</sup> surfaces in the idea that “the free market is a form of government regulation in itself.”<sup>152</sup> The theme of functionalism appears in the sample treatment of remedies.<sup>153</sup>

## II. ... AND ITS “HEIRS”

Messages from the “heirs” of legal realism<sup>154</sup> also figure prominently. Jay Feinman is quoted twice, once to make the CLS point that law is a balance between altruism and individualism<sup>155</sup> (describing modern contract law’s “attempts to balance the individualist ideals of classical contract with communal standards of responsibility to others”),<sup>156</sup> and a second time to emphasize the ideological nature of contract law.<sup>157</sup> Boyle also refers to Richard Posner’s “classic text” on law and economics and to Michael Trebilcock’s efficiency-based critiques of restraint of trade.<sup>158</sup>

Critiques based on identity politics, including the categories of race, sexual orientation, and gender also arise. A section on “Freedom of Contract” marshals Ian Ayres’ work on gender and race discrimination in car sales,<sup>159</sup> Boyle references a “gay-friendly approach,”<sup>160</sup> and, most significantly, she develops an extended section on feminism between the fourth and seventh editions, culminating in a

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149. *Boyle & Percy* 7th ed, *supra* note 23 at 1.

150. *Ibid* at 6.

151. See Singer, *supra* note 147 at 477-95.

152. *Boyle & Percy* 7th ed, *supra* note 23 at 3.

153. *Ibid* at 6-7.

154. Singer, *supra* note 147 at 504.

155. See Kennedy, “Form and Substance,” *supra* note 9.

156. *Boyle & Percy* 7th ed, *supra* note 23 at 5, citing Jay Feinman, “The Significance of Contract Theory” (1990) 58:4 U Cin L Rev 1283 at 1287-88.

157. *Boyle & Percy* 7th ed, *supra* note 23 at 8, citing Peter Gabel & Jay Feinman, “Contract Law as Ideology” in David Kairys, ed, *The Politics of Law* (New York: Pantheon Books, 1982).

158. *Boyle & Percy* 7th ed, *supra* note 23 at 7.

159. Ian Ayres, “Fair Driving: Gender and Race Discrimination in Retail Car Negotiations” (1991) 104:4 Harv L Rev 817.

160. *Boyle & Percy* 7th ed, *supra* note 23 at 11, quoting Craig W Christensen, “Legal Ordering of Family Values: The Case of Gay and Lesbian Families” (1997) 18:4 Cardozo L Rev 1299. This text appeared in *Boyle & Percy* 6th ed, *supra* note 23 at 5, and continues to appear in *Boyle & Percy* 9th ed, *supra* note 23 at 12.

two-page survey of feminist thought,<sup>161</sup> by far the most significant treatment of feminism of all the casebooks.<sup>162</sup> Also unique among the Canadian casebooks, Boyle dedicates a little over a page to “First Nations and Treaties,” illustrating how treaties differ from conventional contracts and suggesting how a study of contract law can inform an understanding of the fiduciary obligation of the Crown and other issues of interpretation.<sup>163</sup>

Rounding out the survey of legal thought, Boyle also gives prominent place to theorists of relational contracts and insights from socio-legal scholarship. The very first sentence of the chapter is a quotation from Macneil, that the law of contracts is “an affirmation of the human will to affect the future” through the projection of exchange.<sup>164</sup> Later, an entire section on Relational Contracts not only introduces students to Macneil’s concept,<sup>165</sup> but also connects the concept to

161. The first reference to feminism appeared in the 4th edition, where Boyle included just one short paragraph, noting that Dalton’s work on deconstruction drew on feminist methodology, but that “[i]t is too early yet for general themes to have emerged in the literature.” Dalton, *supra* note 5; Boyle & Percy 4th ed, *supra* note 23 at lxv. In the fifth edition, two paragraphs were added, largely highlighting feminist critiques of specific public policy problems (preconception contracts, cohabitation agreements, pay equity, domestic work, affirmative action). Boyle & Percy 5th ed, *supra* note 23 at lxxxii. The sixth edition adds a paragraph on feminist analyses that “have tended to be critical of contract law’s emphasis on the notion of exchange,” also highlighting that “[f]eminist analyses have been critiqued in their turn ... for failing to include perspectives drawn from lesbian legal theory.” Boyle & Percy 6th ed, *supra* note 23 at 6-7. The seventh edition adds three paragraphs, including long quotes, totaling almost a page. The main focus of these additions is on the exclusion of women from the “social contract,” with a counterpoint by Justice Bertha Wilson. Boyle & Percy 7th ed, *supra* note 23 at 8-9.

162. Swan has a short paragraph in which she refers to two articles. See Swan 9th ed, *supra* note 21 at s 2.253, citing Mary Joe Frug, “Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook” (1985) 34:4 Am U L Rev 1065 and Barbara Sullivan, “It’s All In the Contract: Rethinking Feminist Critiques of Contract” (2001) 18:2 Law in Context 112. Waddams reproduces an excerpt from just one article in the “Perspectives” chapter. Waddams 5th ed, *supra* note 22 at 16, excerpting Gillian K Hadfield, “An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law” (1998) 146:5 U Pa L Rev 1235.

163. Boyle & Percy 7th ed, *supra* note 23 at 11-12.

164. *Ibid* at 1. All editions, up to the present, commit the typographical error of writing “protecting exchange,” instead of “projecting exchange,” Macneil’s actual formulation. Boyle & Percy 9th ed, *supra* note 23 at 1; Macneil, *New Social Contract*, *supra* note 69 at 4.

165. Boyle & Percy 7th ed, *supra* note 23 at 10, citing Macneil, *supra* note 69.



later chapters<sup>166</sup> and considers several counterpoints.<sup>167</sup> Since the second edition, the editors cite Stewart Macaulay to demonstrate that law may not be a significant mechanism for dispute settlement.<sup>168</sup> And, also since the second edition, a “Final Word of Caution” concludes the chapter. This final word, reminiscent of both *Swan*<sup>169</sup> and *Milner*,<sup>170</sup> calls into question case law’s centrality and suggests a sociological alternative:

The student should realize that the emphasis on case law, especially appellate case law, is not the only way to study “law” and represents a particular focus which not all would accept as useful. One alternative would be to discover empirically-recurring problems for contracting parties and examine the impact of the law on these problems, rather than allowing the choice of appropriate areas of study to be dictated by the lottery of litigation. Such an approach would concentrate on the total functioning of the law, that is, on the sociology of the law as a means of social control and as a mechanism for dispute settlement.<sup>171</sup>

This final suggestion completes the picture of an approach that fundamentally challenges the tenets of classical legal thought: that law operates neutrally on all parties, that legal reasoning is distinct from political and policy argument, and that judicial formulations of rules based on the model of the discrete contract best govern the phenomenon of exchange.

## 2. BEN-ISHAI AND PERCY’S INFLUENCE

Ben-Ishai and Percy refine and reinforce the realist and critical messages advanced by Boyle. They do, however, communicate a slight shift in emphasis. In the place of Boyle’s extended emphasis on feminism and First Nations (Ben-Ishai and Percy abridge or remove the respective sections), Ben-Ishai and Percy communicate a concern for substantive equality in both their discussion and examples. The eighth and ninth editions do, however, contain new text with decidedly realist

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166. *Boyle & Percy* 7th ed, *supra* note 23 at 10 (referring to “Battle of the Forms”).

167. *Ibid* at 10, citing Melvin A Eisenberg, “Why There is No Law of Relational Contracts” (2000) 94:3 *Nw UL Rev* 805. See also *Boyle & Percy* 5th ed, *supra* note 23 at lxxxi, citing Patricia J Williams, “Alchemical Notes: Reconstructing Ideals from Deconstructed Rights” (1987) 22:2 *Harv CR-CL L Rev* 401.

168. *Boyle & Percy* 7th ed, *supra* note 23 at 6, citing Stewart Macaulay, “Elegant Models, Empirical Pictures and the Complexities of Contract” (1977) 11:3 *Law & Soc’y Rev* 507 at 510. See also *Boyle & Percy* 2nd ed, *supra* note 23 at lvi.

169. 9th ed, *supra* note 21 at ss 1.38-1.40.

170. 1st ed, *supra* note 20 at xi.

171. *Boyle & Percy* 7th ed, *supra* note 23 at 13.

influences; the impression is therefore not a distancing from, but a reorientation of, the critical project—toward a concern with distributive justice.<sup>172</sup>

For example, Ben-Ishai and Percy expand on the “freedom of contract” theme by adding a section on the common law response to freedom of contract. Here, they make the claim that judicial interventions have ensured that freedom of contract “was never perfectly realized”<sup>173</sup>—both “within the traditional categories of contract law” (citing Lord Denning as a *cas typique*) and in the creation of “general principles that transcend” the law of contract, such as the fiduciary principle<sup>174</sup> and the doctrine of good faith.<sup>175</sup> By emphasizing these judicial attacks on the pure laissez-faire model, they implicitly further the realist message that law is not distinct from politics, and that contract doctrine in particular “inescapably engages courts in making moral and public policy decisions about the legitimate distribution and use of power in the market place.”<sup>176</sup> Moreover, in language resembling Waddams’ introduction to his textbook, they argue that the explicit recognition of these values by judges is important:

The covert use of traditional contract rules provides a measure of protection to the weaker parties, but in a manner that is often unpredictable and unsatisfactory and that can actually hide the real reasons for the decision. A failure by judges to openly discuss the real reasons for their decisions may mislead the appeal courts and commentators. ... Moreover, there is a danger that the rule pressed into service to provide a fair result will itself be distorted. Subsequent applications of the distorted rule ... may lead to arbitrary or unfair results.<sup>177</sup>

The concern with “weaker parties” may also reflect Ben-Ishai’s scholarly concern with substantive equality in the financial sector.<sup>178</sup> This concern is also seen in the way in which she and Percy supplement the example of racial

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172. About half of the language in this section is taken from Chapter 11 of the seventh edition, written by David Percy (“Limits on the Pursuit of Self Interest: An Editor’s Comment”). *Boyle & Percy* 7th ed, *supra* note 23. One innovation of the eighth edition is to remove Chapter 11 and to foreground its ideas in the introductory chapter. On the role that Chapter 11 played in the seventh edition, see *Boyle & Percy* 7th ed, *supra* note 23 at vi.

173. *Ben-Ishai & Percy* 9th ed, *supra* note 23 at 7.

174. *Ibid* at 8, citing *Hodgkinson v Simms*, [1994] 3 SCR 377, 117 DLR (4th) 161.

175. *Ibid*. The edition came out before the Supreme Court of Canada’s decision in *Bhasin v Hrynew*, 2014 SCC 71, [2014] 3 SCR 494 so does not include discussion of that case (which recognized an “organizing principle” of good faith in the common law) [*Bhasin*]. Compare *Swan* 9th ed, *supra* note 21 at ss 2.256-2.259 (reproducing *Bhasin* in the remedies chapter).

176. Singer, *supra* note 147 at 486.

177. *Ben-Ishai & Percy* 9th ed, *supra* note 23 at 7.

178. See e.g. Stephanie Ben-Ishai & Saul Schwartz, “The Role of Government as a Creditor of the Disadvantaged” (2010) 35:2 Queen’s LJ 539.

discrimination in car sales with a study on racial discrimination in mortgage lending<sup>179</sup> and incorporate an article on “bullshit” credit card agreements into the discussion on regulatory intervention.<sup>180</sup>

### 3. BEN-ISHAI'S REMEDIES CHAPTER

The remedies chapter, which Ben-Ishai also edits, is equally laced with references to legal realism and other critical perspectives. In some respects, these messages are even more prominent than in the other books. For example, where *Swan* significantly criticizes the law and economics theory of efficient breach,<sup>181</sup> and where *Waddams* treats it rather neutrally, mentioning it but without commentary or emphasis,<sup>182</sup> in *Ben-Ishai and Percy*, the related idea that “contract breach should be morally neutral” frames the chapter, positioned at the outset as the “dominant position.”<sup>183</sup> Law and economics themes are treated uncritically throughout the chapter, for example by offering Posner's critique of *Groves v John Wunder Co* without any critical response,<sup>184</sup> presenting as fact without evidence the idea that economic efficiency accounts for the preference for damages over specific performance,<sup>185</sup> or “assuming that most contractual parties will generally act in an economically rational way,” without defining “economically rational” or providing empirical support.<sup>186</sup>

That the editor imagines realist themes to be central to the remedies chapter is also signaled by the fact that the very first learning objective listed at the beginning of the chapter is that students will “[a]rticulate and assess the general policy considerations influencing judicial decisions.”<sup>187</sup> Questions and

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179. *Ben-Ishai & Percy* 9th ed, *supra* note 23 at 5, citing RD Marico, “The Higher Cost of Being African-American or Latino: Subprime Home Mortgage Lending in New York City 2004-2005” (2007) NYLS Legal Studies Research Paper No 07/08-12.

180. *Ben-Ishai & Percy* 9th ed, *supra* note 23 at 4.

181. See *Swan* 9th ed at ss 2.399 (deliberate efficient breach conduct is rare because parties want to preserve their reputation), 2.428 (efficient breach can have no impact on long term relational contracts). See also, *ibid* at ss 2.88, 2.396, 2.406.

182. *Waddams* 5th ed, *supra* note 22 at 106, 172.

183. *Ben-Ishai & Percy* 9th ed, *supra* note 23 at 792. The first two excerpts in the chapter are from Oliver Wendell Holmes, with his “bad man” quote, and Richard A Posner. See *ibid* at 793, reproducing Holmes, “The Path of the Law” (1897) 10:8 Harv L Rev 457; Richard A Posner, *Economic Analysis of Law*, 6th ed (New York: Aspen, 2003).

184. *Ben-Ishai & Percy* 9th ed, *supra* note 23 at 833; *Groves*, *supra* note 141.

185. *Ibid* at 937.

186. See *e.g. ibid* at 938. Reference is made to Ian Macneil's argument critical of efficient breach, but only by way of citation, not discussion. *Ibid* at 794.

187. *Ibid* at 791.

commentary emphasize how policy considerations are “obscured by verbal formulae”<sup>188</sup> and ask students to conduct policy reasoning.<sup>189</sup> The related idea that contract law embraces the balancing of competing values also surfaces.<sup>190</sup> Moments where the editor emphasizes the importance of bench composition,<sup>191</sup> or suggests that judges use flexible formulations or engage in contestable interpretations to arrive at ends they deem appropriate<sup>192</sup> would seem to reflect a realist concern with judicial background and psychology.<sup>193</sup> As with *Swan*, the student is invited to consider the practical motivations of clients<sup>194</sup> and to imagine the practice of law as transcending the barrister’s mode to include that of the solicitor.<sup>195</sup> All of this is interspersed with references to popular culture<sup>196</sup> and accessible everyday examples<sup>197</sup> that serve to ground the material in students’ direct and familiar experience.

Combined, these references give the impression that the editor of the chapter is skeptical of the idea that contract law doctrine is a closed and coherent system of abstract rules determinable by ratiocination. These references convey the impression that contract law is better understood through a realistic appreciation of underlying factors, be they judicial preference, client demands, the balancing of values, ideology, or policy considerations. This slate of messages reproduces elements from the “skeptical” tradition of American legal thought.<sup>198</sup>

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188. *Ibid* at 880.

189. See *e.g. ibid* at 833 (“Should the deliberate nature of the defendant’s breach have had any influence on the approach of the majority?”), 889, 934.

190. See *e.g. ibid* at 791 (“the study of contractual remedies offers an introduction to values in contract law such as efficiency and morality”), 934.

191. See *ibid* at 890 (calling “noteworthy” the change in the composition in the Manitoba Court of Appeal between two cases).

192. See *ibid* at 890 (“the obvious flexibility of the principles of *Hadley v Baxendale* [(1854), 9 Exch 341, 156 ER 145] allows courts to impose liability when it seems appropriate”), 930.

193. Cf Jerome Frank, *Law and the Modern Mind* (New Brunswick, NJ: Transaction, 1930).

194. See *e.g. Ben-Ishai & Percy* 9th ed, *supra* note 24 at 805 (client motivations make reliance damages a salient jurisprudential issue), 950 (speculating about Bette Davis’s motivations in *Warner Bros*, *supra* note 140).

195. See *e.g. ibid* at 921 (“How could the drafting of the clause in this case be improved?”), 928, 934.

196. See *ibid* at 837, referring to the film *The Paper Chase*, *supra* note 4 to introduce *Hawkins v McGee*, 84 NH 114, 146 A 641 (1929).

197. See *e.g. Ben-Ishai & Percy* 9th ed, *supra* note 23 at 837.

198. Kennedy & Fisher, *supra* note 8 at 6.

## D. SUMMARY OF PART I: “ALL REALIST NOW”

In reflecting these concerns, *Boyle/Ben-Ishai and Percy* resembles the other three casebooks in rejecting classical legal thought and embracing legal realism and related scholarly traditions. The American influence is omnipresent, by virtue of the direct citation of many leading American authors, but also via the general realist sensibility. This sensibility may at times be explained by the editors’ direct experience—Milner, Percy, and Ben-Ishai all spent time studying in the United States. More likely, however, it probably reflects deeper commitments about the nature of law and what it means to be a lawyer. The careful and deliberate editorial decisions reflect an underlying commitment to the idea that beneath the words of judges are a diverse range of factors, all of which contribute to the lawyer’s eclectic toolkit. On the basis of what these editors say, and how they structure their casebooks, it would not seem inapposite to apply the US aphorism and declare that Canadian contract law casebooks are all “realist now.”<sup>199</sup>

## II. THE TRADITIONAL FLIP SIDE: RULES, COURTS, AND LEGAL REASONING

At the very same time, the two most commonly used casebooks in Canada, *Boyle/Ben-Ishai and Percy* and *Waddams*, demonstrate an apparently contradictory tendency. Despite the scholarly commitments to realist and critical ideas that clearly inform the editing of these casebooks, a “traditional” undercurrent, which emphasizes the centrality of rules and the importance of adjudication, produces a series of opposing messages that vie for primacy. These messages recall the formalist, classical ideas about law that the editors purportedly reject. They include the idea that law is the domain of a distinctive and internal rationality, that policy thinking and interdisciplinary perspectives are marginal to legal reasoning, and that the job of the lawyer is to apply rules to facts, paradigmatically before a court. Section II.A sets out how the casebooks and related writings by the editors convey these ideas and II.B outlines how readers of the casebooks and other related writings have received them.

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199. See Laura Kalman, *Legal Realism at Yale 1927-1960* (Chapel Hill: University of North Carolina Press, 1986) at 229; Singer, *supra* note 147 at 465.

## A. MESSAGES CONVEYED BY THE CASEBOOKS

### 1. ANALOGICAL REASONING

The types of questions the editors of *Waddams* and *Ben-Ishai and Percy* ask in their remedies chapters reinforce the conventional image of legal reasoning as analogical, “reasoning by example,” in which the determination of “relevant” similarity is the most important intellectual task.<sup>200</sup> In both books, the editors mine the facts of cases to tease out similarities and differences to encourage students to ask whether there are “rational grounds” for distinguishing cases.<sup>201</sup> Similarly, students are asked to make comparisons between the facts of cases and hypothetical or counterfactual scenarios—whether in general terms or as part of the requirement to “advise” hypothetical clients.<sup>202</sup>

### 2. THE IMPORTANCE OF RULES

This continual return to reasoning by example not only cultivates the type of thinking that many argue is distinctive to the legal discipline,<sup>203</sup> it also reinforces the centrality of rules to law and legal reasoning. As Lloyd Weinreb notes, the dialectical technique of asking whether a particular rule applies to varying hypothetical facts constitutes the pursuit of an “increasingly precise enunciation” of the rule, working toward a “correct statement of the law.”<sup>204</sup> And indeed, rules play an extremely important role in the remedies chapters. In *Waddams*, many

200. See Edward H Levi, *An Introduction to Legal Reasoning* (Chicago: University of Chicago Press, 1949) at 1-6; Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Cambridge, Mass: Harvard University Press, 2009) at 94.

201. See e.g. *Ben-Ishai & Percy* 9th ed, *supra* note 23 at 836, 856, 862, 890 (contrast *Scyrup v Economy Tractor Parts Ltd* (1963), 43 WWR (Man CA) with *Munroe Equipment Sales Ltd v Canada Forest Products* (1961), 29 DLR (2d) 730 (Man CA)—are there rational grounds for distinguishing the case?), 928, 930; *Waddams* 5th ed, *supra* note 22 at 35, 45, 60 (“Is the distinction valid? Should a distinction be made between a carrier, a seller, and a manufacturer?”), 123, 171.

202. See e.g. *Waddams* 5th ed, *supra* note 22 at 32, 36, 44, 53, 79, 111, 120 (“Advise client. Would it make any difference if client’s repudiation was based on expert advice ...?”); *Ben-Ishai & Percy* 9th ed, *supra* note 23 at 813, 817, 828, 836, 880 (“Would the answer be different depending on whether the plaintiff was claiming damages based on expectation or reliance interest?”), 902, 943.

203. See e.g. Lloyd L Weinreb, *Legal Reason: The Use of Analogy in Legal Argument* (New York: Cambridge University Press, 2005), c 1; Schauer, *supra* note 200, c 5; Levi, *supra* note 200. But see Larry Alexander & Emily Sherwin, *Demystifying Legal Reasoning* (New York: Cambridge University Press, 2008) at 3 (“legal reasoning is ordinary reasoning applied to legal problems”).

204. Weinreb, *supra* note 203 at 144.

of the questions following cases invite students to focus on rules, whether to clarify, evaluate, or elaborate upon them.<sup>205</sup> In *Ben-Ishai and Percy*, the editors ask students to distil rules or tests to demonstrate comprehension,<sup>206</sup> and model this skill by frequently distilling the readings into discernable take-aways, often in the form of rules. The editors summarize cases,<sup>207</sup> scholarly articles,<sup>208</sup> and even the entire law of contractual remedies<sup>209</sup> in this way, and some passages in the commentary simply set out rules or principles in the same manner as a conventional treatise might.<sup>210</sup> Moreover, six of the eight learning objectives use action words that presume a fixed rule or other knowledge base: four hope that students will “describe and apply” legal rules, one that students will be able to “calculate” damages, and another that students will be able to “explain” what types of losses are compensable.<sup>211</sup>

### 3. THE MARGINALIZATION OF POLICY

The serious way in which rules are treated in the casebooks contrasts with the realist predilection to discount their importance, a tendency colourfully illustrated by Karl Llewellyn’s hyperbolic claim (subsequently mollified) that rules are nothing but “pretty playthings.”<sup>212</sup> And yet, not only do the casebooks emphasize the rules, they implicitly treat them as more important than underlying policy rationales. In numerous instances in both casebooks, the cases reproduced raise interesting policy issues ripe for discussion, but the editors fail to take them up,

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205. See *e.g.* *Waddams* 5th ed, *supra* note 22 at 35, 45, 60, 123 (*Carter v Long & Bisby* (1896), 26 SCR 430, [1896] SCJ No 48—an excerpt that just provides the rule), 171.

206. See *e.g.* *Ben-Ishai & Percy* 9th ed, *supra* note 23 at 883 (“What are the two limbs of the remoteness test in *Hadley v Baxendale*, [*supra* note 140]?”) 887, 933.

207. See *e.g.* *ibid* at 826 (*Chaplin v Hicks*, [1911] 2 KB 786, [1911-13] All ER 224 “illustrates that courts are not prevented from awarding expectancy damages just because there is an element of guesswork in assessment”), 893-94.

208. See *e.g.* *ibid* at 795 (outline of the three types of damages as a prelude to Fuller & Perdue), 803.

209. See *ibid* at 792.

210. See *e.g.* *ibid.* at 894, 902 (the general rule is that the loss will be assessed at the earliest date the plaintiff can be expected to mitigate).

211. *Ibid* at 791.

212. KN Llewellyn, *The Bramble Bush: Some Lectures on Law and its Study* (New York: Oceana, 1930) at 5, quoted in Schauer, *supra* note 200 at 131; KN Llewellyn, *The Bramble Bush: On Our Law and its Study*, 2nd ed (New York: Oceana, 1951).

preferring more conventional discussion about legal reasoning.<sup>213</sup> The questions that do invite policy-related thinking are often, in the case of *Ben-Ishai and Percy*, vague and open-ended formulations—“should” X be the case, do you “agree,” which choice do you “prefer,” “how” should X be justified<sup>214</sup>—or, in the case of *Waddams*, framed in the most general terms possible (“on the basis of what policy considerations ...”).<sup>215</sup> Little guidance is given to the reader as to what considerations, empirical information, standards, or reasoning techniques might be useful in making policy arguments. In this casual reference to policy, we see a tendency similar to the one identified among US contract law teachers to treat policy discussions as unrigorous and anecdotal in contrast to the tight, technical treatment of conventional legal reasoning.<sup>216</sup>

#### 4. THE CENTRALITY OF ADJUDICATION

The emphasis on conventional legal reasoning is closely connected to the idea that judicial decisions are the best source of information to inculcate such skills. Beyond the trite and obvious point that all four casebooks remain “case” books, reproducing mainly judicial decisions, is the fact that the editors themselves speak in such a way as to suggest that studying adjudication is the most effective means of conveying legal rationality. The best and most explicit example of this among the editors is the following comment by Waddams in the Preface to his textbook, *The Law of Contracts*:

So long as we value rationality in decision making we shall continue to require that like cases should be decided alike and that there should be a rational distinction between cases that are decided differently. I do not believe that these ends can be otherwise realized than by an impartial tribunal giving reasons subject to appeal.<sup>217</sup>

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213. See e.g. *Waddams* 5th ed, *supra* note 22 at 112 (fact pattern about whether a married woman who was sold tranquilizers instead of birth control should have “mitigated” the loss flowing from an unwelcome child by getting an abortion or giving the child up for adoption: only “Advise client,” no discussion of broader issues), 112, 126 (no discussion of why a court may be reticent to supervise an ongoing order), 151; *Ben-Ishai & Percy* 9th ed, *supra* note 23 at 917 (introduction to liquidated damages fails to include the central policy consideration that militates against enforcing penalties), 929 (policy rationale for refusing to enforce penalty clauses as explained in *Elsley v JG Collins Ins Agencies*, [1978] SCR 916, 83 DLR (3d) 1 not taken up by editors), 925, 937.

214. See e.g. *Ben-Ishai & Percy* 9th ed, *supra* note 23 at 889, 920, 817, 825, 856, 880, 901.

215. *Waddams* 5th ed, *supra* note 22 at 171.

216. See Mertz, *supra* note 2 at 76-77.

217. Waddams, “Preface to the First Edition,” *supra* note 125 at vii-viii.



While this final line could be read as simply making the point that adjudication, as “a device which gives formal and institutional expression to the influence of reasoned argument in human affairs, ... assumes a burden of rationality not borne by any other form of social ordering,”<sup>218</sup> it appears to go much further than this. Not only does it state that rationality cannot be realized “otherwise” than through adjudication, but Waddams makes a blanket assertion that some undefined collectivity (“we”) values rationality for reasons unstated. The implied claim is to a professional or disciplinary consensus about the importance of analogical reasoning, presumably on the basis of the rule-of-law idea that law should treat everyone equally (and thus that there should be “rational” distinctions justifying differential treatment).<sup>219</sup> These convictions manifest themselves in the presentation of cases as speaking for themselves throughout *Waddams*, with minimal commentary, and in the many references to analogical reasoning detailed above.

##### 5. THE “TRADITIONAL,” UNPROBLEMATIZED “CORE” OF LEGAL STUDY

In *Boyle/Ben-Ishai and Percy* an analogous phenomenon is at play. We encounter it explicitly for the first time at the very beginning of the Introduction, when the editors state that the focus of the book will be on the “basic skills associated with the analysis and use of case law,” and “the application of rules and principles to hypothetical fact situations.”<sup>220</sup> But it is also evident in the two references to the “traditional” approach adopted by the book. This surfaces first in the Preface, where the editors write (as they have since the first edition) that the “materials and their organization are somewhat traditional, for they are designed to constitute the basis of a core course in contracts.”<sup>221</sup> Similar to *Waddams*, the concept of “core” is not explained, but rather assumed: There is an implied claim that the traditional materials (cases) are central (core), and that other approaches would be peripheral. This impression is reinforced by the caveat placed at the end of the Introduction. At the very end of the “word of caution” in which the editors float the approach of discovering “empirically-recurring problems for contracting parties” and concentrating on the “sociology of the law,” the editors peremptorily dismiss the idea: “Although this approach is not adopted here, our

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218. Fuller, “The Forms and Limits of Adjudication,” *supra* note 65 at 366.

219. For a paradigmatic articulation of the rule of law, emphasizing the importance of common law judges, see AV Dicey, *Introduction to the Study of the Law of the Constitution*, 4th ed (London: Macmillan, 1893) at 173-93, 334-41.

220. 9th ed, *supra* note 23 at 1.

221. *Ibid* at vi; *Boyle & Percy* 1st ed, *supra* note 23 at v.

contributors preferring to concentrate on the inculcation of skills associated with more traditional materials, it is important to remember that this has significant limitations, dictated by the objective chosen.”<sup>222</sup> This move, which one reviewer has called an exercise in “confession and avoidance,”<sup>223</sup> reinforces the sense that traditional skills and materials—analogical reasoning as modeled by judicial reasons for decision—constitutes the unproblematic core of legal study. That this comes at the end of the highly developed critical review is all the more striking.

## B. MESSAGES RECEIVED BY READERS

These messages observed in the language of the casebooks—the centrality of rules and courts, an emphasis on conventional legal reasoning and “tradition” at the expense of policy and other legal processes—also figure prominently in the accounts of the messages “received” by readers of the casebooks. *Boyle and Percy*, in particular, has been the subject of three critical reviews, highlighting many of the themes above. And while *Waddams* has curiously been less reviewed, a review of Waddams’ introductory book, *Introduction to the Study of Law*, suggests how his writing may communicate to beginning law students a vision of law in direct tension with his scholarly commitments.

### 1. MESSAGES RECEIVED FROM *BOYLE AND PERCY*

Reviewers of *Boyle and Percy* highlight its kinship with classical legal thought. For these reviewers, the emphasis on “tradition” translates into a concern with logic, deduction, the marginalization of policy, and decontextualization reminiscent of Langdellian legal science. David Vaver, in a review of the first edition, says that the book “correctly”<sup>224</sup> self-identifies as traditional, and that the book’s “real difficulty” is with its philosophy:

The impression I got is that contract law is a relatively static subject which looks for its solutions to an internally generated logic. ... The format of case followed by notes and questions repeated *ad nauseam* is good as far as it goes, but gives the erroneous impression that contract law is a purely deductive art with the occasional statutory incursion to mar its inexorable internal logic.<sup>225</sup>

Similarly, John Manwaring, who writes that the second edition reminds him of his grandmother’s “traditional black shoes,” argues that it fails to live up to its

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222. *Boyle & Percy* 7th ed, *supra* note 23 at 13.

223. Devlin, *supra* note 19 at 149.

224. *Supra* note 19 at 567.

225. *Ibid* at 571-72.

potential of debunking formalism. While Manwaring approves of the “traditional design” of placing formation first in the book, in part because it permits students to first understand and then gradually problematize the “formal logic of the law of contracts,”<sup>226</sup> Manwaring writes that the book fails to avoid the danger of presenting the law of contracts as “a system of scientific rules to be deduced from certain basic principles or premises,”<sup>227</sup> and asserts:

The weakness of the book is precisely that the issues are raised in the introduction and not adequately integrated into the discussion of doctrine. ... After the introduction, these issues are either never mentioned again, or mentioned in a perfunctory note. The student will quickly get the message: the study of law involves the study of cases. The rest is just gloss. It is not really law but merely policy. ... Thus, the decision to structure the book according to the categories of the formal logic of contract law gives the impression that formalism is still tenable after all these years. ... [W]hat would have been an important step forward in Canadian casebook design if done with the requisite sophistication becomes a step backwards into history.<sup>228</sup>

Richard Devlin, reviewing the fifth edition, similarly highlights the marginalization of critical ideas that results from a traditional understanding of what a “core” course of contracts should look like. He details how the book fails to adequately incorporate the critical messages of the introduction into the other chapters, which tend “to focus on the micro details of [their] particular subject area.”<sup>229</sup> In particular, he bemoans the “decontextualizing (and depoliticizing) tendency” of certain chapters: “Certainty of Terms” and “Representations and Terms” fail to identify the interpretive framework of “ideological dispositions” despite a cursory reference, and the chapter on frustration ignores critical scholarship that elucidates where “economic powerless(ness) and the ideologies of contract law come into sharp relief.”<sup>230</sup> And while issues of race and gender fare better, representing “significant progress in the process of modernizing and contextualizing contract law,” these issues are ultimately “ghettoized” by being characterized, for example, “as ‘women’s issues’ and therefore marginal.”<sup>231</sup>

The failure of the editors to encourage the contributors to explicitly incorporate these critical ideas represents a “curious surrender of editorial influence” that deprives the book of a “greater intellectual depth and stronger

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226. Manwaring, *supra* note 19 at 784-85.

227. *Ibid* at 785.

228. *Ibid*.

229. Devlin, *supra* note 19 at 146.

230. *Ibid* at 146-47.

231. *Ibid* at 147.

thematic coherence.”<sup>232</sup> It also, however, contributes to the messages of marginalization. By leaving it to instructors to supplement the “core” casebook with their own materials, it can lead some students to “resist on the basis that it is not real law and they are only being forced to study these issues because of the subjective preferences of the individual teacher.”<sup>233</sup> Devlin argues that the “basics” and “core” should be considered “contestable and contingent upon certain material and ideological presumptions.”<sup>234</sup> To a certain degree, Devlin exemplifies this possibility when, after having been invited to edit the chapter on frustration in the sixth edition, he includes in it the concept of social force majeure.<sup>235</sup> However, even after having taken on the chapter, he still impliedly retains his critique of the overall book as having an “overwhelming emphasis ... on relatively traditional doctrinal discussion and analysis.”<sup>236</sup>

## 2. MESSAGES RECEIVED FROM WADDAMS

Criticism has also been leveled at Waddams for portraying a view of law that constructs an uncritical “core” of law and legal reasoning, impliedly discounting or marginalizing the exogenous perspectives of policy, politics, and context. To a certain extent, we see this in reviews of Waddams’ editions of *Milner*, as when Christopher Carr lamented that the second edition “neglects” a critical and functional approach to contract law,<sup>237</sup> or when Ian Kyer described the third edition as fitting “comfortably into the traditional mold.”<sup>238</sup> But, curiously, there appears to be no review of *Waddams* in the scholarly literature. Accordingly, this section focuses on a review of his primer, *An Introduction to the Study of Law*, a venue where Waddams attempts to explicitly convey features of law to incoming students. It, too, was first published in the late 1970s.<sup>239</sup>

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232. *Ibid* at 148.

233. *Ibid* at 149.

234. *Ibid*.

235. *Boyle & Percy* 6th ed, *supra* note 23 at 688-92.

236. Richard Devlin, Anthony Duggan & Louise Langevin, “Doing Theory in First Year Contracts: The Iceberg Method” (2007) *Can Legal Educ Ann Rev* 1 at 1, n 18 (citing *Boyle & Percy* as one example for this proposition).

237. Carr, *supra* note 19 at 458-59; *ibid* at 461 (“It is lacking in editorial comment, analysis, and criticism, it raises few questions about the subject-matter, and it is particularly deficient in its failure to refer to leading articles and comments on the various topics and cases”).

238. Kyer, *supra* note 19 at 153.

239. (Toronto: Carswell, 1979).

## I. INTRODUCTION TO THE STUDY OF LAW: RODERICK MACDONALD'S CRITIQUE

Most reviews of *Introduction to the Study of Law*, the first such Canadian primer, were positive, if brief.<sup>240</sup> By contrast, Roderick Macdonald's review in the *University of Toronto Law Journal* is lengthy and critical. The review has two parts: first, he focuses on the text to discern the attitudes about law, legal education, and the role of the lawyer that are "implicit" in the materials.<sup>241</sup> Second, he reports on the "explicit and implicit views picked up by students" on the basis of his own "canvass [of] the reactions of those who have read it as a preparation for law school."<sup>242</sup> Macdonald's review is important for two reasons: it generates an impression, however caricatured, of the underlying attitudes about law communicated by Waddams' writing. Also, by highlighting the fact that the received messages are apparently in contrast with Waddams' own legal thought, it highlights the complex nature of the tensions within pedagogical texts in Canada, a theme explored in greater depth in Part III.

On the basis of his textual analysis, Macdonald argues that the "fundamental orientation" of the book<sup>243</sup> conveys the idea that

law and justice are separate concerns, that justice is relative and often not capable of rational discovery, and that equity, fairness, and justice militate against a law which is stable, certain, and predictable ...

Waddams appears to suggest that it is not only desirable, but also possible, for judges simply to apply the law, ... justifying their judgments by an appeal to a pre-existing law which can be objectively determined.<sup>244</sup>

In portraying Waddams as committed to the separation between law, which is objective and discoverable through reason, and justice, which is relative, Macdonald is unsubtly associating Waddams with classical claims to legal

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240. See Alan Pratt, Book Review of *Introduction to the Study of Law* by SM Waddams, (1979) 37:2 UT Fac L Rev 270 (praising the book's "economy and wit"); Ken Norman, Book Review of *Introduction to the Study of Law* by SM Waddams, (1980) 45:1 Sask L Rev 171 at 172-73 (highlighting the book's "style and manner," "currency and pertinence," and its having "adequately circumnavigated the world of what law is, who lawyers are, how they think, and why law teachers behave as they do"); Roger Bilodeau, Book Review of *Introduction to the Study of Law*, 3rd ed, by SM Waddams, (1988) 67:2 Can Bar Rev 394 (a "concise and complete picture of how Canada's legal system operates").

241. RA Macdonald, Book Review of *Introduction to the Study of Law*, 3rd ed, by SM Waddams, (1981) 31 UTLJ 436 at 437 [Macdonald, Review].

242. *Ibid* at 444.

243. *Ibid* at 438-9.

244. *Ibid* at 439, 440.

science.<sup>245</sup> He also highlights this idea when he describes Waddams's "traditional view of law, legal problems, and the lawyer's role."<sup>246</sup>

Macdonald goes much further when he describes a series of propositions and corollaries derived from students' reactions to the primer. These include the primacy of adjudication, the objective nature of law, and law's distinctive disciplinary reasoning. Macdonald enumerates them as follows:

1. All law happens in courts: a/ the adversarial, adjudicative processes of the common law are the best, if not the only way for a legal system to operate; b/ all other societal decision-making agencies, including legislatures, perform a minor role in the Canadian legal system; c/ hence, the lawyer's principal preoccupation is with reading and analyzing cases and in preparing for court.
2. ...
3. Law is a distinct discipline with its own internal logic: a/ concerns such as justice, morality, economic efficiency, and social practice are only marginally related to the business of determining the law; b/ law can be compartmentalized, and legal practice is largely a matter of finding the correct rule to apply ...
4. ...<sup>247</sup>

On the one hand, this interpretation simply states in unadorned fashion many of the observations made above about the casebook's (and textbook's) predilection for conventional legal reasoning and the importance of courts. On the other hand, the Macdonald interpretation would seem to run expressly counter to Waddams' realist ideas that underlying values need to be examined, that "the foundations of even the most firmly established rules are being undermined,"<sup>248</sup> and that it is what judges do, in addition to what they say, that matters.<sup>249</sup> The marginalization of "justice, morality, economic efficiency, and social practice" that Macdonald observes would equally seem to contradict the instrumental and purposive philosophy of law ascribed to Waddams by Reiter and Swan,<sup>250</sup>

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245. And indeed, the separation goes back even further, to the idea that "for law we have a measure. ... Equity is according to the conscience of [the] Chancellor." Schauer, *supra* note 200 at 123, citing John Selden, *Table Talk of John Selden*, Frederick Pollock ed (London: Quartich, 1927).

246. Macdonald, Review, *supra* note 241 at 441. See also, *ibid* at 443.

247. *Ibid* at 445.

248. Waddams, "Preface to the First Edition," *supra* note 125 at viii.

249. Waddams, "Unconscionability in Contracts," *supra* note 120 at 1.

250. Reiter & Swan, "Reasonable Expectations," *supra* note 47 at 2 ("We all believe that the law, and this includes the rules governing contracts, is and should be instrumental. That is, the law attempts to support particular principles and to promote particular policies, and this purposive aspect of the law is both desirable and inevitable"). See also, *supra* note 113.

Waddams' functional approach in his textbook, and his later nuanced claims about the interdependence of policy and principle in contract law.<sup>251</sup>

Macdonald seems to intuit this apparent divergence when he writes:

It is nowhere suggested that the author himself would subscribe to any of these views implicit in his manual. He may, in fact, reject them all. Nevertheless, they are all perspectives that intending law students who read the book gained from it. They are all perspectives which, one suspects, any reader of *Introduction to the Study of Law* would develop.<sup>252</sup>

The idea that there may be a gap, if not outright contradiction, between the commitments held by an author and the messages received by the reader, brings into sharp relief the main problem posed by this Part. How are we to characterize the apparently contradictory set of messages in *Boyle/Ben-Ishai and Percy* and *Waddams*? What might account for these tensions? And what do they say about Canadian legal education and Canadian legal thought? Part III offers some preliminary thoughts in response to these questions.

### III. CHARACTERIZING THE CONTRADICTION

The cohabitation of realist and critical messages, on the one hand, and traditional or classical ideas, on the other, can give rise to a number of characterizations. First, one might think that external pressures have compelled editors to act in ways inconsistent with their genuinely held beliefs. Second, one could conceive of this co-presence of ideas as reflecting genuine ambivalence: editors believe two contradictory things at the same time. Third, the commitment to realist or critical ideas, expressed via traditional means, may be reconciled by reference to a distinctive feature of Canadian legal thought. This Part argues that while all three possibilities merit future investigation, the final possibility may be the richest.

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251. See e.g. SM Waddams, *Principle and Policy in Contract Law: Competing or Complementary Concepts?* (Cambridge, UK: Cambridge University Press, 2011) at 227-28. See also SM Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (Cambridge, UK: Cambridge University Press, 2003).

252. Macdonald, Review, *supra* note 241 at 450.

## A. EXTERNAL PRESSURES

One way of understanding the tension is that the expressed commitments to realism demonstrate a genuine belief, whereas the commitments embodied by what the editors do reflect the influence of external pressures. This conception would be supported by the notion that healthy minds seek to reduce dissonance,<sup>253</sup> and that had the editors been able to do so, they would have consistently executed their beliefs.

### 1. THE FAMILIAR TROPE: THEORY VS PRACTICE, ACADEMY VS PROFESSION

The first candidate of an external pressure relates to the timeless and “fierce” debate between the academy and the profession.<sup>254</sup> On this view, the critical and realist ideas reflect the theoretical and academic commitments of the authors, but pressures from the profession have compelled a more traditional execution.

There are two reasons why this familiar trope does not map particularly well onto the realities of the casebooks. First, *Swan*, the book that communicates realist messages most consistently, is the book in which the editor’s identity as practitioner is most highly developed and internalized. This fact suggests the converse inference: responsiveness to the demands of the profession may be more conducive than a purely “academic” approach to doing what one says about legal realism.

Second, rather than highlighting the dichotomous vision of theory and practice, the casebooks tend to reinforce their mutually reinforcing qualities.<sup>255</sup> All casebooks combine scholarly analysis and articles with notes and questions in

253. See Leon Festinger, *A Theory of Cognitive Dissonance* (Stanford, Cal: Stanford University Press, 1957).

254. See generally C Ian Kyer & Jerome E Bickenbach, *The Fiercest Debate: Cecil A Wright, the Benchers, and Legal Education in Ontario* (Toronto: The Osgoode Society, 1987); HW Arthurs, “The Tree of Knowledge / The Axe of Power: Gerald Le Dain and the Transformation of Canadian Legal Education” (2012) Osgoode Hall Law School Comparative Research in Law & Political Economy Research Paper No 25/2012 at 5, online: <digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1022&context=clpe>; Task Force on the Canadian Common Law Degree, *Final Report, October 2009* (Federation of Law Societies of Canada, 2009); American Bar Association Task Force on the Future of Legal Education, *Report and Recommendations* (2014: American Bar Association), online: <www.americanbar.org/content/dam/aba/administrative/professional\_responsibility/report\_and\_recommendations\_of\_aba\_task\_force.authcheckdam.pdf>.

255. Cf Kronman, *supra* note 147. For a discussion of other “integrative” views, see David Sandomierski, “Training Lawyers, Cultivating Citizens, and Re-Enchanting the Legal Professional” (2014) 51:4 *Alta L Rev* 739 at 744-54.



which students are asked to “apply” principles to problems. In the two books that refer explicitly to practice, *Swan* and *Milner*, the ideas are treated as conciliatory. Swan’s focus on usefulness derives from the realist theory of law as instrumental; conversely, her empirical concern with clients’ actual needs translates into a theoretically developed notion of the “reasonable expectations of the parties.” In this, Swan may be more thoroughly influenced by Macneil’s casebook than the passing reference in the Preface to the first edition of *Swan* might suggest: Macneil specifically rejects the separation of “policy, justice, and practice” in his book.<sup>256</sup>

Likewise, Milner’s Fullerian commitment to law (and life)<sup>257</sup> as a process informs equally his academic quest to understand law and his invocation to students to consider how they may be useful to their clients. Milner, teaching at the University of Toronto in the decades following the “fiercest debate” between the Law Society of Upper Canada and the Faculty of Law, could have easily reproduced this tension; instead, his incorporation of practical and academic virtues in his introduction<sup>258</sup> implies that the oppositional story may not so much represent truth as it is a “history written by the winners.”<sup>259</sup>

## 2. THE CAPABILITY (AND UNAVAILABILITY) PROBLEMS

The other possible external factor is the lack of availability of sources other than case law. Just as judges are only capable of solving certain types of problems, there may be a “capability problem” of case law,<sup>260</sup> and the traditional focus on legal reasoning may simply result from the natural limits of the judicial case as primary pedagogical source. While this analysis is one that I accept and expand upon in the Conclusion, I do not believe that the unavailability of sources accounts for editors’ choices. This is so for two reasons.

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256. Macneil casebook, *supra* note 70 at xix. Macneil writes:

I do not believe that policy, justice and practice can ... be separated. The deep currents both of social justice and of social injustice flowing through our exchange-oriented socioeconomic system manifest themselves in every “practical” contract question. At the same time, no one unfamiliar with the “practical” world of contracts can fully understand the exchange currents of social and economic policy flowing so strongly through our society and its legal system.

257. *Cf* Fuller, “Law School,” *supra* note 65 at 204 (focusing on process is “metaphysically sound”: “Life is itself a process, and by making process the center of our attention we are getting closer to the most enduring part of reality”).

258. *Milner* 1st ed, *supra* note 20 at xiii-xiv (exalting university study in his discussion of the tendency to ask whether a case is “rightly decided”).

259. RCB Risk, “My Continuing Legal Education” (2005) 55:3 UTLJ 313 at 313.

260. *Cf* Richard Danzig, *The Capability Problem in Contract Law* (Mineola, NY: Foundation Press, 1978).

First, the casebook authors could have emphasized a broader set of legal reasoning skills than they do, even on the basis of cases. “Case in context studies” can highlight historical and other contextualizing factors;<sup>261</sup> party behaviour and motivations can be inferred from appellate judgments; and “case files” can foreground problem-solving skills.<sup>262</sup> Only *Swan* does this as a central feature of the book, by invoking the solicitor’s perspective; the other authors occasionally do it, demonstrating their awareness of the possibility, but it is a marginal practice.<sup>263</sup>

Second, the editors themselves do not state, argue, or even bring to consciousness the possibility that they are constrained. Boyle could have easily, and much more persuasively, justified the preference for a more traditional approach by arguing that she simply did not have access to “empirically-recurring problems of contracting parties.”<sup>264</sup> Instructors sympathetic to the sociological approach do make such arguments.<sup>265</sup> Swan presumably has access to such information by virtue of her law practice, and would be well placed to opine about the problem of its general availability, but does not do so when she comments about the inadequacy of case law. There is no conscious acknowledgement of these external forces despite the sophisticated self-awareness of the limitation of cases. Accordingly, the “external pressures” explanation is less compelling.

## B. AMBIVALENCE

An alternative psychological paradigm to cognitive dissonance is the idea that it is not necessarily pathological, but rather potentially therapeutic, to feel or believe two contradictory things at the same time.<sup>266</sup> This construct of ambivalence may better explain the tension in the books. On this interpretation, it is not simply that casebook editors “believe” in realism and “execute” convention, but rather that both ideas flow from distinct sets of genuinely held commitments.

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261. See *e.g. ibid.* Danzig’s work is referred to, although merely in passing, in *Ben-Ishai & Percy* 9th ed, *supra* note 23 at 883.

262. See *e.g.* Douglas Leslie, “CaseFile Method,” online: <casefilemethod.com>.

263. See *e.g. supra* notes 194 & 195 (solicitor skills in *Ben-Ishai & Percy*).

264. *Boyle & Percy* 7th ed, *supra* note 23 at 13.

265. See *e.g.* Interview of Instructor 042 (12 March 2013) at lines 105-12 (“the problem is that [cases are] really what we have in the public domain, but it’s misleading since by definition the case law describes *pathological relationships* ... Our socio-legal friends tell us [that litigation occurs] something like one or two percent of commercial time, so what kind of lens or telescope or vantage point is this, really? The difficulty is that you can’t go on *field trips* inside of law firms to watch the constitution of contracts, the formation of contracts in action”).

266. See LaPlanche & Pontalis, *supra* note 26 at 26ff, citing Sigmund Freud, *Instincts and Their Vicissitudes*.

The best example of apparent ambivalence lies in the *Milner* Introduction. After so eloquently developing the idea that adjudication needs to be de-centred from legal education, Milner goes on to state that his “apology for so many cases is not quite abject, because first year law students are expected to learn thoroughly the judicial process, how and why it works and what its limitations are.”<sup>267</sup> Why are law students “expected” to learn the judicial process? Does Milner feel this expectation is justified? He does not say. This lack of explanation implies that he is committed, perhaps subconsciously, to adjudication after all. One can infer a similar ambivalence in the *Boyle/Ben-Ishai and Percy* Introduction. The matter-of-fact way in which the editors announce that they prefer traditional methods and materials suggests a strong underlying commitment to them. One can easily read the casebooks and not gain the impression that the various argument-types surveyed are the product of a “wholesale assault on the jurisprudence of forms, concepts, and rules.”<sup>268</sup> Instead, the overwhelming emphasis is the sustained commitment to forms, concepts, and rules and the simultaneous enchantment with the arguments that have debunked them.

If the co-presence of countervailing ideas is best explained by simultaneous commitment to contradictory beliefs, then the presence of ambivalence in Canadian legal thought deserves further inquiry. For example, the casebooks might suggest that in contrast with American legal thought, which is characterized by “methodological rivalry and generational rebellion expressed with polemic force,”<sup>269</sup> the Canadian experience reveals a sensibility more inclined to toleration. Avenues for inquiry may include a return to early realist preoccupations with psychology<sup>270</sup> and seek to deploy twenty-first century insights from cognitive science or even neuroscience to explore the nature of the law professor’s mind. Alternatively, explorations into Canadian legal culture could explore the extent to which the co-presence of multiple legal traditions<sup>271</sup> may incline to a more ambi- or multi-valent conception of legal ideas.

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267. *Milner* 1st ed, *supra* note 20 at xi. *Cf Milner* 2nd ed, *supra* note 20 at xxxi (expanding on themes of institutional competence and private normative arrangements to “protect the reader against an over-exposure to judicial opinions”).

268. Kennedy & Fisher, *supra* note 8 at 10.

269. *Ibid* at 3.

270. Frank, *supra* note 193.

271. For an example of the Supreme Court of Canada’s common practice of citing to diverse common law jurisdictions and to the Quebec civil law, even in a common law case, see *Bhasin*, *supra* note 175. On Canada’s identity as a “Métis nation,” see John Ralston Saul, *A Fair Country: Telling Truths About Canada* (Toronto: Penguin, 2008). For an example of Canada’s constitutional embrace of common and civil legal traditions, see *Constitution Act, 1867*, s 92(13); *Quebec Act of 1774*, 14 Geo III c 83.

## C. RECONCILIATION

As pregnant as these avenues for further inquiry are, another characterization is plausible. This is the idea that Canadian legal thought may be characterized in a way that reconciles the commitment to realism and the commitment to “forms, concepts, and rules.”<sup>272</sup>

### 1. A UNIFIED CONCEPTION: REALIST IDEAS *SERVE* THE RULE OF LAW

On a particular level, we might seek to reconcile the apparently disparate ideas via a unified philosophy of law. For example, when Waddams states in the preface to his textbook that “rational decision making is strengthened, not weakened, by open recognition of conflicting values,”<sup>273</sup> he implies that realism furthers the goal of legal rationality. Put more fully: the rule-of-law value that law ought to treat everyone equally requires that there be rational distinctions to justify differential treatment. Adjudication is the pre-eminent legal process for cultivating this rationality, and thus should be focus of legal education. Understanding legal rationality requires not only understanding what judges say but also (not “instead”)<sup>274</sup> what they do. As Waddams explains:

It is better to recognize competing values, even if that recognition appears to involve a difficult and uncertain balance, than to pursue certainty by adopting a rule that suppresses important countervailing principles. Such pursuit is self-defeating, for important values are rarely permanently suppressed. The rule that is supposed to achieve clarity and certainty becomes riddled with exceptions, judicial and statutory, devised to avoid injustice, and leads in the end to the loss of the very certainty that was supposed to be its chief merit.<sup>275</sup>

Accordingly, for a thinker such as Waddams, there may be no contradiction between a realistic tendency to understand underlying values and a desire for judicial rule-making to attain “certainty.”

In a similar vein, another editor, John McCamus, espouses the view that understanding underlying concerns directly serves the solidity of doctrine.

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272. This is not the same as asking whether the ideas of legal realism and classical legal thought can be reconciled—which would be a jurisprudential problem of considerable difficulty. Instead, the question is whether there is a story or a characterization that can explain why having a commitment to each simultaneously neither represents acting opposed to one's beliefs nor holding two contradictory ideas.

273. Waddams, “Preface to the First Edition,” *supra* note 125 at viii.

274. Waddams, “Unconscionability in Contracts,” *supra* note 120 at 1.

275. *Ibid* at vii-viii [emphasis added].

McCamus plays a major role in both *Waddams* and *Boyle/Ben-Ishai and Percy*.<sup>276</sup> He has also published the longest, and perhaps most widely recommended, contract law textbook in Canada.<sup>277</sup> In the Preface to that book, he foregrounds the importance of doctrine: “The main objective ... is to provide an accurate account of the principles and doctrines of the law of contract as it is currently understood and practiced in the common law provinces of Canada.”<sup>278</sup> Yet, unlike other Canadian texts, whose prefaces and introductions paint a more formalist picture of the role of the treatise,<sup>279</sup> McCamus emphasizes the common law’s “adaptability to changing social and economic circumstances and its ability to reformulate doctrine in light of evolving professional attitudes and insights as to how the law can be improved.”<sup>280</sup> Although he aims not to “commingle the objectives of exposition and constructive criticism,”<sup>281</sup> and is clearly concerned with more positivistic desires to “unravel the mysteries”<sup>282</sup> of doctrines or “get to the bottom of things,”<sup>283</sup> contract law’s underlying rationales seem integral to the very doctrine that his work attempts to elucidate.

This attitude is particularly apparent in the way McCamus describes his approach to teaching:

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276. McCamus has edited the chapter on “Representations and Terms; Classification and Consequences” since the first edition of *Boyle & Percy*. He also edits a chapter in *Waddams* and contributes the subject of restitution to a “number of chapters.” Interview of John D McCamus (28 February 2014) at lines 527-30 (attributed with permission).

277. Compliments for the McCamus text proliferate in my interviews. It was the book that most professors recommended to students seeking clarity.

278. John D McCamus, *The Law of Contracts*, 2nd ed (Toronto: Irwin Law, 2012) at xxiii [McCamus, *Law of Contracts*].

279. See GHL Fridman, *The Law of Contract in Canada*, 6th ed (Toronto: Carswell, 2011) at v (revisions “ensure that [the text] reflects the *true content* of an area of the common law that is ... *logical but sometimes applied irrationally* in order to achieve a just, fair, reasonable and commercially sound result” [emphasis added]), 1 (“vital difference between legal and moral obligations”); Bruce Macdougall, *Introduction to Contracts*, 2nd ed (Markham, Ont: LexisNexis, 2012) at vii (“This part of what is called the Law of Obligations is fortunate in having a certain unity and logic to it”). Nothing, however, compels a textbook writer to foreground doctrine or logic. See Angela Swan & Jakub Adamski, *Canadian Contract Law*, 3rd student ed (Markham, Ont: LexisNexis, 2012) at s 1.1 (“The belief that underlies this work is that the Canadian law of contracts exists to forward the values that underlie Canadian society”).

280. McCamus, *Law of Contracts*, *supra* note 278 at xxiii.

281. *Ibid* at xxiv.

282. *Ibid*.

283. *Ibid* at xxv. McCamus is here referring to the attitude of Allan Farnsworth, with whom McCamus once collaborated.

[It is important for students] to consider whether the doctrine does in fact have a solid foundation in public policy. If it doesn't, it's likely to change. If it does, it's *unlikely* to change. ...

I certainly tell the students that there's no real distinction between law and public policy. Law *is* an exercise in developing, implementing, and applying public policy choices to social activity, commercial activity, of various kinds. ... [Understanding the ... basic architecture of the doctrine of promissory estoppel and what the problems with it are ... no doubt *rests* on the analysis of why would we give some effect to a promise that's relied upon—and was *intended* to be relied upon. ... The two analytical tasks are quite deeply related and it's never been my view that you could somehow teach the law without thinking about the policy aspects of it.<sup>284</sup>

Accordingly, the underlying factors of policy and context (“changing social and economic circumstances”) are considered not as a challenge to, but directly in service of, doctrine. As with Waddams, realistic insights serve to buttress the formalist demands of a “solid” doctrine. This interpretation reconciles the commitment to two apparently contradictory views. The “basic” commitment is that the rule of law requires that (1) there be a solid body of rules that (2) are applied equally to all people, requiring (3) a well-refined rationality to justify differential treatment in similar circumstances. (4) This rationality is best refined and developed through judicial reasoning; thus, its study should be the predominant activity of legal education. Realistic attitudes are important not because they challenge these tenets, but because they serve them: by elucidating and sharpening judicial reasoning and rationality, and by ensuring that the rules are “solidly founded.”

This interpretation may very well explain some of the apparently contradictory statements in the casebooks, and it may also capture the attitudes of some law teachers. Nevertheless, it is unlikely to fit the bill in all instances. The realist project, recall, was a “*wholesale* assault”<sup>285</sup> on classical legal thought. In its purest form, it serves to destabilize, not solidify, “forms, concepts, and rules.”<sup>286</sup> Accordingly, this rule-of-law explanation likely does not fully account for instances of strong critical perspectives, such as those in the *Boyle/Ben-Ishai and Percy* Introductions. Even if the intellectually ambitious project of reconciling realism and formalism were possible, it likely would not explain all instances of apparent contradiction in Canadian contract law casebooks. A broader characterization of legal thought may be required.

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284. Interview of John D McCamus, *supra* note 276 at lines 218–45.

285. Kennedy & Fisher, *supra* note 8 at 10 [emphasis added].

286. *Ibid.*

## 2. METHODOLOGICAL HOMOGENEITY AND THEORETICAL ECLECTICISM

The foregoing review of the Canadian contract law casebooks points the way to such a characterization. Whereas in the United States, legal reasoning may accurately be described as an “eclectic practice built from the methodological sediment laid down by successive projects of wholesale criticism and reform,”<sup>287</sup> and law as a “practice of arguments learned, made, developed over time, accepted, and rejected,”<sup>288</sup> in Canada, methodological homogeneity prevails. As outlined above, in both *Waddams* and *Boyle/Ben-Ishai and Percy* the skill of identifying relevant differences through hypothetical fact scenarios predominates.<sup>289</sup> And even *Swan*, whose solicitor’s perspective serves as counterpoint to the other two books, includes a good number of such examples, suggesting that reasoning by example has a centre of gravity around which even the most critical Canadian perspectives revolve.<sup>290</sup>

At the same time, Canadian contract law casebooks do evidence an eclecticism, but on scrutiny, this remains at the level of theory, not methodology. Instead of marshaling the various realist and critical theories to construct a series of diverse argument-types for the lawyer’s “eclectic toolkit,”<sup>291</sup> they serve as either a gloss on, or foil for, the one dominant mode of argumentation—reasoning by analogy. The “Perspectives” chapter in *Waddams*, which “reflects a lively interest ... in the *theory* of contract law,” is an excellent illustration of the tendency.<sup>292</sup> While the assembly of theories is impressive and diverse, changing over time with successive editions, it functions very much as a standalone. The editors do not appear to draw explicit connections between these readings and the substantive content in later chapters.<sup>293</sup>

A similar tendency surfaces in *Boyle/Ben-Ishai and Percy*. Editors of the individual chapters do not appear to incorporate the critical perspectives from the meticulously recrafted introduction into the substantive chapters. Such was Devlin’s critique of the fifth edition, and it continues to apply today. As noted

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287. *Ibid* at 3.

288. *Ibid* at 8.

289. *Supra* notes 201 & 202.

290. See e.g. *Swan* 9th ed, *supra* note 21 at ss 2.204 (“Should the rules for damages differentiate between dogs and stereos?”), 2.143, 2.267, 2.475.

291. Kennedy & Fisher, *supra* note 8 at 3.

292. *Waddams* 5th ed, *supra* note 22 at iii [emphasis added].

293. See e.g. *ibid* at 112, question 5 (“B replies that he could not so treat an old and valued customer”). Instead of connecting the theme of relational contracting raised by the quoted material to the Macaulay reading in Chapter 1, the student is merely asked to “Advise A,” with reference to another case.

above, “policy” questions are often vague, whereas students are repeatedly asked to compare and distinguish cases and to create or respond to hypotheticals and counterfactuals.<sup>294</sup> As in *Waddams*, editors occasionally forfeit the opportunity to take up interesting policy questions in favour of conventional legal reasoning.<sup>295</sup> The implication is that critical perspectives primarily provide fodder for loose commentary, whereas analogical reasoning deserves repeated drilling and refining.<sup>296</sup> Moreover, even critics like Devlin emphasize “theory” as a virtue, without referencing any desire to operationalize theory into diverse forms of legal argumentation.<sup>297</sup> “Doing *Theory* in First Year Contracts” becomes posited as the aspirational goal.<sup>298</sup>

The casebooks thus suggest that Canadian legal thought may express a commitment to theoretical eclecticism and methodological homogeneity. Although a wide variety of critical perspectives are admitted into the canon of contract law teaching, they are not permitted to inform the core methodology of what it means to think like a lawyer. None of the casebooks seems to take seriously the idea that different substantive ideas about law imply different methods of legal reasoning and argumentation.<sup>299</sup> Consigned mainly to “theory,” critical perspectives are relegated to the margins in a way that encourages some contract law teachers to devalue policy reasoning by treating it as “free-form,” “anecdotal,” or “speculative” in contrast to the “tight, technical” exercise of “correct legal reading.”<sup>300</sup> This marginalization may not be intended: the commitments to the critical ideas in the casebooks appear genuine. But a powerful and monolithic understanding of legal methodology frustrates their penetration into what

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294. See *supra* notes 214, 215, 201 & 202.

295. See *supra* note 213.

296. Cf Mertz, *supra* note 2 at 76-77.

297. Devlin, *supra* note 19 at 148 (“we should ... address issues of theory from day one”).

298. Devlin, Duggan & Langevin, *supra* note 236 (title).

299. Compare Daniel Markovits, *Contract Law and Legal Methods* (New York: Foundation Press, 2012) at xi, 19:

*Contract Law and Legal Methods* aims to avoid the intellectual and pedagogic sins that conventional casebooks invite. It [pursues] this ambition by embracing Langdell’s great insight—that the generic structure of a teaching text should fit the conceptual structure of the subject taught—in the shadow of modern ideas about the nature of law...

The economic focus of the treatment of contract remedies ... should be approached as a case study, designed to illustrate one among several methods of legal analysis, which sometimes converge and sometimes compete, and whose relative influence is always a contentious matter. The economic analysis of contract remedies... provides a useful introduction to interdisciplinary legal methods more generally, by illustrating what a successful interdisciplinary approach to law looks like.

300. Mertz, *supra* note 2 at 75-77.



activities and thinking skills are considered and taught as “legal.” Simply put, in Canada, contract law editors do not translate their theoretical eclecticism into methodological pluralism.

### 3. PEDAGOGICAL EFFECTIVENESS

There is yet another lens through which one can view the co-existence of realist and formalist messages in casebooks. Up until now, I have analyzed the books as artifacts, parsing their words to elucidate implicit and explicit messages that they communicate about law and legal reasoning. But these books are not just artifacts; they are also tools for teaching. Thus, it is also important to consider how the casebook editors may have envisioned their actual use by instructors. Doing so suggests we may reconcile the apparent contradiction between realist and formalist views in two possible ways.

On the one hand, the *Boyle/Ben-Ishai and Percy* and *Waddams* editors might intend for the theoretical perspectives to be incorporated into the course material, and would be pleased if they were to be integrated into a more eclectic vision of legal reasoning. Their reticence to do so themselves may simply reflect their view of the appropriate allocation of responsibility between editor and instructor: Unlike *Swan*, which advances one central argument, their approach is to leave it to individual professors to accomplish these tasks in the way they deem fit. On this view, the marginalization of policy and the relegation of critical perspectives to the un-operationalized domain of “theory” is not the intended end, but the unfinished work of the casebook—a waystation en route to classroom experience.

This interpretation is certainly plausible. At minimum, the editors of both books emphasize that the books are designed as teaching tools, meant to serve a wide variety of approaches.<sup>301</sup> Moreover, the *Boyle/Ben-Ishai and Percy* editors specifically highlight the role of the instructor in promoting “critical reflection.”<sup>302</sup> The fact that some law professors actually do attempt to incorporate the material from the introductory chapters into later substantive areas also suggests that the

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301. See *Ben-Ishai & Percy* 9th ed, *supra* note 23 at vi (“The book continues to be designed primarily as a teaching tool ... [W]e do not attempt to imbue the reader with a particular philosophy. ... Rather we try to note a number of different approaches to contracts throughout and to leave scope for individual teachers to pursue their own themes with these materials as a solid base”); *Waddams* 5th ed, *supra* note 22 at iii (“[W]e have designed it to be suitable for dealing with the material in several different orders. ... We hope that all will find the book equally suitable for their purposes”).

302. *Ben-Ishai & Percy* 9th ed, *supra* note 23 at 1-2 (“Your own instructor will direct you to and discuss with you the writings that he or she feels will best promote critical reflection on the basic material reproduced here”).

casebooks may serve this function.<sup>303</sup> Moreover, as I have developed elsewhere, it is quite common for professors to claim that they are exposing students to a wide range of theories in order to cultivate a diverse series of arguments.<sup>304</sup> As one professor explains, a “convincing” argument is one that “is going to be some combination of legal impact, policy effect, and values.”<sup>305</sup> The fact that the casebooks do not directly operationalize critical perspectives into argumentative practices may not preclude their ability to serve instructors’ desires to do so. Indeed, this delegation of responsibility between editor and instructor may be an effective pedagogical design to accomplish this end.

On the other hand, it is equally plausible that the editors conceive of the casebooks’ pedagogical role as emphasizing the “core” status of doctrinal rules and analogical reasoning. On this view, critical perspectives are important to understand, but really secondary to the “basics.” The marginalization of policy and theory in the books is a concretization of this pedagogical belief. This attitude surfaces in the words of the editors, who describe their books as being “designed to constitute the basis of a core course in contracts,”<sup>306</sup> or as a “collection of materials suitable for the basic course in the subject.”<sup>307</sup> This interpretation is

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303. See *e.g.* Interview of Instructor 009 (26 September 2013) at lines 222–48 (incorporating critical perspectives from *Ben-Ishai & Percy* into class discussion). However, it must also be noted that a good proportion of instructors do not assign the introductory or perspectives chapters of the books. Based on syllabi, six instructors do *not* assign the *Waddams* perspectives chapter, as opposed to three who do. By contrast, seven instructors do not assign the introductory chapter in *Boyle/Ben-Ishai & Percy*, whereas seventeen do. Interestingly, one instructor who teaches from *Swan* assigns the *Waddams* perspective chapter. The theme comes up occasionally in interview. See Interview of Instructor 048 (16 July 2014) at lines 393–413; Interview of Instructor 025 (10 April 2014) at lines 443–45 (does not assign the *Waddams* Perspectives Chapter).

304. David Sandomierski, “Theory and Practice, Together At Last: A Heretical, Empirical Account of Canadian Legal Education” in Meera Deo, Mindie Lazarus-Black & Elizabeth Mertz, eds, *Legal Education Across Borders* (Routledge) [forthcoming in 2018].

305. Interview of Instructor 064 (22 October 2015) at lines 584–86. See also Interview of Instructor 033 (9 April 2014) at line 480 (specifically cultivating the ability to make arguments by randomly assigning students positions based on themes of class, race, and power). Despite these claims, however, I demonstrate elsewhere that, for the most part, contract law professors predominantly do not succeed at truly operationalizing their critical and realist commitments into eclectic methods of reasoning. For the most part, they emphasize the conventional reasoning focused on rules and analogical reasoning that the casebooks do. See David Sandomierski, *Theory & Practice, Realism & Formalism, and Aspiration & Reality in Canadian Contract Law Teaching* (SJD Thesis, University of Toronto Faculty of Law, 2017) [unpublished], c. 5.

306. *Ben-Ishai & Percy* 9th ed, *supra* note 23 at vi.

307. *Waddams* 5th ed, *supra* note 22 at iii.

further supported by the fairly common tendency of contract law professors to produce their own supplements in order to highlight critical perspectives<sup>308</sup> or to counteract the perceived shortcomings of the casebooks.<sup>309</sup>

Which is the more accurate view? Certainly, among contract law professors, the answer is one of diversity and pluralism. The very survival in the marketplace of *Swan* makes any sweeping generalization impossible: Many instructors specifically use *Swan* because its overarching argument enables them to operationalize ideas of legal realism into practice and diverse modes of legal thinking.<sup>310</sup> Nevertheless, the majority market share of the other two books, the fact that their editors come from almost every common law Canadian law school, and the fact that the books undergo regular restructuring and editing, suggest that the dominant messages of

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308. See *e.g.* Interview of Instructor 009, *supra* note 303 at lines 106-49. Of the 58 professors who assigned a commercial casebook, 21 assigned supplementary materials that included scholarly articles. An additional 11 professors assigned supplementary materials that focused primarily on additional cases or references to short pieces of legislation.

309. See *e.g.* Interview of Instructor 006 (25 February 2013) at lines at 67-124 (insufficient problems and exercises in all Canadian casebooks); Interview of Instructor 010 (6 June 2013) at lines 200-43 (providing more contemporary examples than in *Ben-Ishai & Percy* to appeal to students' sense of relevance); Interview of Instructor 021 (9 April 2014) at lines 556-608 (filling in key moments missed when some cases taken out of *Ben-Ishai & Percy*); Interview of Instructor 017, *supra* note 142 at lines 109-203 (providing more context, more contemporarily relevant examples, and more gendered material than in *Waddams*); Interview of Instructor 027 (9 May 2014) at lines 621-49 (providing extended excerpts to teach the cases more as "parables" in contrast to the editing in *Waddams* that "strip[s] the guts out of cases"); Interview of Instructor 033, *supra* note 305 at lines 240-56, 324-57 (supplementing the "weak section on the ... explicit role of public policy and morality" in *Ben-Ishai & Percy*, and exposing students to the themes of "sex, race, and power" in a more detailed way than the introduction does); Interview of Instructor 035 (4 March 2014) at lines 616-37 (without a "conscious effort" to include "big picture issues," they would be missed because *Ben-Ishai & Percy* "doesn't really raise those issues at all ... and that would be one of my minor disappointments"). Occasionally, instructors feel the need to supplement *Swan*, too. See *e.g.* Interview of Instructor 016 (5 June 2013) at lines 741-47.

310. See *e.g.* Interview of Instructor 013 (29 May 2013) at lines 55-87, 111-24:

the *Swan* and Reiter book ... make[s] decisions based on a *complex matrix of things* including the facts, their ... response to the facts, motivated by concerns about fairness, and then using legal argumentation to support the conclusion. ... I think that that is a much more accurate way of describing what courts do and how judges actually do make decisions, and therefore if you're trying as a lawyer to either predict what's going to happen in a case, or you're trying to put together an argument with a view to determining what's going to happen in a case, or you're drafting a contract with a view to trying to achieve a specific legal result, you need to take into account all of those things."

See also Interview of Instructor 023 (24 April 2014) at lines 315-26.

the casebooks do illustrate a widespread viewpoint. This viewpoint surfaces in the ideas expressed by a number of professors that “critical” perspectives are a tertiary concern after acquiring “knowledge of the rules” and “legal reasoning skills.”<sup>311</sup> A good number underemphasize or altogether eschew critique, on the grounds that one cannot productively be critical until one knows the “basics.”<sup>312</sup>

The idea that the casebooks are primarily a launching pad for instructors to realize their own desired ends may be too simplistic and disregard the integral role that the books play in the construction of legal consciousness.<sup>313</sup> As artifacts, casebooks capture and reflect the attitudes of their editors, who are teachers themselves. As pedagogical tools, they structure and guide the way that instructors teach the course. Many of these instructors are not specialists, and may be inclined to defer to the methodological and substantive guidance of the expert editors.<sup>314</sup> Moreover, many professors do not engage in a systematic review of the casebooks prior to selecting them; informal pressure to adopt

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311. See *e.g.* Interview of Instructor 026 (24 April 2014) at lines 201-49 (just mentioning the first two); Interview of Instructor 050 (2 June 2014) at lines 37-57; Interview of Instructor 022 (19 February 2014) at lines 403-35; Interview of Instructor 038 (20 May 2014) at lines 91-134; Interview of Instructor 011 (date redacted) at lines 57-70.

312. See *e.g.* Interview of Instructor 006, *supra* note 309 at line 308; Interview of Instructor 030 (27 March 2014) at line 121; Interview of Instructor 054 (9 May 2014) at line 923; Interview of Instructor 059 (23 July 2014) at line 292; Interview of Instructor 039 (8 June 2014) at lines 609, 641.

313. Cf. Angela Fernandez & Markus D. Dubber, eds., *Law Books In Action: Essays on the Anglo-American Legal Treatise* (Oxford: Hart, 2012).

314. See *e.g.* Interview of Instructor 021, *supra* note 309 at lines 549-54 (“[Boyle/Ben-Ishai & Percy] was the book that was being used here. ... When I did my graduate work, contract law was not my area. So ... I said, ‘What’s the easiest path of resistance here?’ And I picked up that book”); Interview of Instructor 062 (16 May 2014) lines 815-17 (“I was *loath* to make any changes. I didn’t remove anything because I thought, ‘Who am I to remove something? If [the editor] thinks it’s relevant, I’m going to keep it’”); Interview of Instructor 026, *supra* note 311 at lines 587-603 (“I thought about making my own syllabus, but I hadn’t studied law in Canada. ... For my commercial law course ... I *did* design my own syllabus, and it was an *enormous* amount of work. ... I didn’t want to do that for a first year course for ... I was a totally inexperienced teacher. ... So I wanted to use one of the established casebooks”); Interview of Instructor 051 (16 July 2014) at lines 194-99 (“I’d never taught Contracts before and ... trying to reinvent the wheel when you’re in your first year teaching is as I’ve learned from experience, ... generally a good idea. It’s better to ... take ... what’s there and ... *then* decide what you want to change”).

the “house” book is often too hard to resist.<sup>315</sup> Sunk costs are also an issue: it is relatively rare for instructors to change books.<sup>316</sup> Accordingly, these books not only provide a template around which instructors may design a course, they communicate authoritative understandings about the “core” substance and methodology of contract law. Given this entangled function of reflecting and

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315. The professors who spoke about the process of selecting a casebook overwhelmingly adopted the “house book.” Of these, nineteen (Professors 6, 11, 16, 17, 21, 26, 33, 35, 38, 45, 51, 54, 57, 59, 61, 65, and 66) described their decisions as being motivated by wanting to have consistency with fellow instructors, as wanting to draw on colleagues’ experience, or simply not wanting to “buck” the trend. By contrast, only one (Professor 26) described reviewing all three casebooks in detail prior to teaching the course the first time. See *e.g.* Interview of Instructor 017, *supra* note 142 at lines 552–64 (“I was going to try to use Angela Swan’s ... but I felt as a starting person, ‘No—I can’t do that! I have to use the house book.’ ... Because I have ... no credibility. ... [I]t’s very difficult I think when you’re first starting out to *buck*”). Most of the time, the pressure was only informal, but in one case there was a specific intervention by the Dean to adopt the house book. See Interview of Instructor 041 (date redacted) at lines 555–59 (“The Dean ... came to me and said, ‘Okay, you’re the only one who’s not—you’re the *junior person*. You don’t want to be ... seen as being different unless you’re really committed to it. So are you really committed to it?’ And I said, ‘No, not particularly’”).

316. Only thirteen professors described changing casebooks, or indicated an intention to do so (of these, only two (Professors 25 and 51) indicated having tried all three). The overwhelming impression is that most professors choose one casebook and stick with it, often because of the investment made. See *e.g.* Interview of Instructor 017, *supra* note 142 at lines 572–83 (“What I think can sometimes happen, is that, so you’ve been doing it a certain way—you just keep doing it that way because it’s just way easier and you can spend your time on other things”); Interview of Instructor 065 (11 April 2015) at lines 136–38 (“to be honest with you, [*Ben-Isai & Percy*] wasn’t *my* selection, and it’s just been more a product of the fact that that is now the casebook that I’ve used and will going forward”). Some professors indicated a commitment to alternating casebooks in order to seek a better fit with their convictions about law, or to keep things fresh for students, but these seemed to be exceptions that proved the rule. See *e.g.* Interview of Instructor 013, *supra* note 310 at lines 55–78

(I had a long conversation with John Swan, as he then was, and he convinced me. He said to me something that resonated to me based on my experience in practice which was that the issues that we focus [on] ... in the Boyle and Percy approach ... put emphasis on the wrong things— ... technical issues of contract formation which in the vast majority of cases ... are *not issues at all*. And that the much more complex and indeed for that reason socially important ... issues are issues related to damages, and remedies more generally. ... I decided ... that I would investigate using his book and after looking at it, was convinced that it was a better tool for teaching contracts to students in a way that would allow them to *appreciate* not only what was important about contracts, but ... would give them a *better sense* of the nature of contract law rules);

Interview of Instructor 025, *supra* note 303 at lines 302–303 (“I just think [switching casebooks is] a good thing to do. To some extent it shakes up the students a little”).

constituting legal consciousness, the casebooks' tendency toward homogenous methodology combined with theoretical eclecticism may have a great deal to say about Canadian legal thought more generally.

## CONCLUSION: BACK TO THE FUTURE

Canadian casebooks can at times seem curiously anachronistic. Continual refinements have brought in contemporary examples but have not fundamentally changed the perspectival framing of the books, which came of age in the late 1970s. The dominant theoretical framing remains the realist attack on the classical consensus, with a dose of seasoning from later schools of thought sprinkled throughout. The tension between these influences and the conventional execution was identified a generation ago, with the invocation that "issues raised in the introduction" should be better "integrated into the discussion of doctrine."<sup>317</sup> After a generation of minimal progress on this front, today's challenges are analogous, but much more thoroughgoing. My analysis of the casebooks suggests three avenues for remedial inquiry and response.

### A. INCORPORATING THEORETICAL ECLECTICISM INTO LEGAL METHODOLOGY

If the desire is to consistently carry through the commitments of American Legal Realism and its heirs, then at minimum Canadian casebook editors ought to confront the challenge of incorporating their theoretical commitments into a broader view of what constitutes legal reasoning and methodology. Consciousness about conflicting values, unequal treatment of persons according to class, race, and gender, economic behaviour, and injustice ought to be operationalized into a rigorous set of policy and argumentative skills and treated as core elements of the lawyer's "eclectic toolkit." Inspiration may be sought from other casebooks that attempt to do this explicitly.<sup>318</sup>

### B. AN EXPLICIT DEFENCE

Alternatively, editors may wish to confront, acknowledge, and defend a commitment to methodological homogeneity. A strong rule-of-law argument, akin to the one imputed to Waddams and McCamus above, could serve to justify a focus on legal rationality. It could be defended as consistent with theoretical

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317. Manwaring, *supra* note 19 at 785.

318. See *e.g.* Markovits, *supra* note 299.

eclecticism on the grounds that operationalizing theoretical commitments into methodological practice risks instrumentalizing and diluting these powerful critiques, and that the theories should be preserved pure for the social purpose of critique. This avenue would have the virtue of bringing any background commitments to the fore, so that they may be subject to conscious scrutiny and scholarly debate.

### C. A THIRD WAY: A NEW FRAMEWORK FOR STUDYING CONTRACT LAW

There is a third option. This is to acknowledge the natural limits of teaching contract law using judicial decisions and to transcend them via a wholesale project of pedagogical reform. Specifically, a new set of materials could be designed around, as the *Boyle and Percy* editors initially suggested in 1981, “empirically recurring problems for contracting parties.”<sup>319</sup> Such a set of materials would shift the focus away from the rules and legal reasoning found in decided cases toward the actual practices and norms involved in everyday contracting. The prevailing metaphor for the contract law casebook—a portable law library<sup>320</sup>—could be reimagined into a version of field notes that capture, or a field guide that structures, empirical observations of contract law in action.<sup>321</sup>

Such a model would have a number of virtues. The sociological approach could contribute to bringing critical, policy, and other perspectives into the core of legal reasoning. Empirical examples would expose students to concrete illustrations of injustice and systemic barriers to the law’s pursuit of fairness. The policy choices and problem-solving skills needed to confront these issues would appear as pressing and relevant to what law is (and lawyers are) meant to do. Second, such materials could make the Fullerian goal of producing social architects via an emphasis on multiple legal processes more attainable. In the United States, at least, attempts to embody methodological pluralism, even

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319. *Boyle & Percy* 2nd ed, *supra* note 23 at 14 lviii. The benefits of such an approach were floated even earlier. See *Milner* 1st ed, *supra* note 20 at xvi (“We are, I think, still lagging behind the other social sciences in our study of the law-in-action, yet that is where the functional analysis receives its only important testing”).

320. See *Milner* 1st ed, *supra* note 20 at vii; Bruce Kimball, “Langdell on Contracts and Legal Reasoning: Correcting the Holmesian Caricature” (2007) 25:2 *Law & Hist Rev* 345 at 348.

321. *Cf* Interview of Instructor 042, *supra* note 265 at lines 110-12, 640-45 (“The difficulty is that you can’t go on *field trips* inside of law firms to watch the constitution of contracts, the formation of contracts, in action. ... Take the field trip to Bay Street, and as often as not, you’ll find folks engaged in long-term planning exercises, not adjudicative exercises, in respect of which—drafting a will, or incorporating a company, or preparing a trust instrument, or negotiating a contract, or doing tax planning—the role of law is invisible”).

when explicitly highlighting legislative processes, are still curiously intertwined with appellate case law.<sup>322</sup> A set of sociological legal materials could disrupt this tendency.

Moreover, this embrace of “process” pluralism could lead to a more robust legal pluralism. In one respect, focusing on real contracting behaviour could highlight parties’ private normative systems, and suggest to students that their “toolkit” should include the ability to identify and navigate alternate normative environments, deploying versatile skills and strategies to diverse situations.<sup>323</sup> In another respect, de-centring state normativity may have the effect of making other legal traditions more visible in, and relevant to, “core” contract study. In this regard, a sociological set of contract materials could help incorporate Indigenous perspectives and traditions into the Contract Law course—for example, by studying exchange practices in traditional communities, the effects on planning and exchange caused by changes to restrictions on reserve land ownership,<sup>324</sup> or the distinctive practices of negotiation and interpretation of treaties<sup>325</sup>—consistent with the spirit of Recommendations 27 and 28 of the Truth and Reconciliation Commission of Canada.<sup>326</sup>

The challenges of producing such a set of materials are real, not the least of which is the cost and difficulty of obtaining proprietary and confidential information that might accurately reflect parties’ actual negotiating practices. But better to confront these barriers than to acquiesce to the veiled power of inertia and the subconscious. Over a century has passed since the realist invitation to

322. See e.g. Markovits, *supra* note 299 (focusing on appellate cases in a methodologically plural approach to contract law); John F Manning & Matthew Stephenson, eds, *Legislation and Regulation* (New York: Foundation Press, 2010) (a casebook format for the new course of the same title). See also Kennedy & Fisher, *supra* note 8 at 5 (“it continues to be true that ‘thinking like a lawyer’ means thinking like an appellate judge”).

323. Cf Interview of Instructor 042, *supra* note 265 at lines 79-95:

I try to persuade students that contract is a dynamic and forward-looking mode of social ordering and that therefore it’s a course about lawyers’ involvement in the construction of little legal systems, each time they negotiate a contract. And although it’s a planning exercise, a dynamic forward-looking exercise, there are all kinds of really good skills that are grounded in law, but are nonetheless skills. So, negotiation, figuring out how much to say when and where, determining how many of a client’s instructions should be acted upon, and later on, maybe, having to convert a deliberately ambiguous or informal arrangement into codified form.

324. See *Jobs and Growth Act, 2012*, RSC 2012, c 31 (5th Supp), ss 206-209.

325. On this last point, see *Boyle & Percy* 7th ed, *supra* note 23 at 11 (a passage removed in the eighth edition).

326. Truth and Reconciliation Commission of Canada, *Calls to Action* (Winnipeg, MB: Truth and Reconciliation Commission of Canada, 2015) at 3.



move from “law in books” to “law in action.”<sup>327</sup> While Canadian casebook editors explicitly and consciously pledge allegiance to this idea, the “digestion” of realism into the academy is by no means “complete.”<sup>328</sup> A serious effort to “do” what is “said” might enable the next generation of law teachers and students to unleash the full potential of Canadian contract law teaching.

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327. See Pound, *supra* note 28.

328. Konefsky et al, *supra* note 28, cited in Gerber, *supra* note 35 at 627.

